Supreme Court, U.S.
FILED
NOV 29 2006
OFFICE OF THE CLERK

No. 06-767

IN THE

Supreme Court of the United States

OBERWEIS DAIRY,

Petitioner,

v.

JANE DOE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ANTHONY J. CREMENT
Counsel of Record
EDWARD N. DRUCK
WILLIAM R. POKORNY
FRANCZEK SULLIVAN, P.C.
300 S. Wacker Drive
Suite 3400
Chicago, IL 60606
(312) 986-0300

Attorneys for Petitioner

204871

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

Jane Doe sued Petitioner, Oberweis Dairy, Inc., under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that she was sexually harassed by another employee, Matthew Nayman. It is undisputed that Doe and Nayman had sex, and that Doe was an "active participant" in this encounter. The district court granted Oberweis's motion for summary judgment, holding that Doe's Title VII claim was barred because she refused repeated requests by the Equal Employment Opportunity Commission for an interview, leading the Commission to dismiss her charge for failure to cooperate. The district court further held that Doe could not prevail on her Title VII claim because there was no issue of material fact for trial as to whether her encounter with Nayman was unwelcome. On appeal, the Seventh Circuit reversed, holding that Doe had no duty to cooperate with the EEOC's investigation as a prerequisite to suit under Title VII, and that Doe need not show that Nayman's conduct was unwelcome because at the time she was below the age of consent established by Illinois state law.

Three questions are presented:

1. Does a person claiming to be aggrieved by a violation of Title VII have a duty to cooperate with the Equal Employment Opportunity Commission's efforts to investigate the person's charge of discrimination, such that failure to cooperate may bar the person from maintaining a private action under Title VII?

2. Must a plaintiff who voluntarily engaged in sexual intercourse with a co-worker prove that the encounter was unwelcome and that she subjectively perceived the co-worker's conduct to be hostile or abusive in order to establish a claim of sexual harassment under Title VII, notwithstanding the fact that the plaintiff was below the age of consent established by state law?

3. If the second question is answered in the affirmative, did the district court correctly conclude that Doe failed to present evidence establishing a disputed issue of material fact for trial as to whether her sexual encounter with Nayman was unwelcome, and whether she subjectively viewed her work environment as hostile or abusive as a result of the encounter?

PARTIES TO THE PROCEEDINGS

Petitioner is Oberweis Dairy, Inc. Respondent is Jane Doe, who was permitted to proceed under a pseudonym. In addition, Jane Roe and Jane Roe 2 (also pseudonyms) were permitted to appear as proposed intervenor-appellants. The United States Equal Employment Opportunity Commission, the National Employment Lawyers Association, Women Employed, and the Illinois Coalition against Sexual Assault appeared as *amicus curia* in support of the respondent, Jane Doe.

RULE 29.6 STATEMENT

Petitioner Oberweis Dairy, Inc. is a non-governmental corporation. Petitioner is a wholly owned subsidiary of The Oberweis Group, Inc. No publicly held company has any ownership interest in Petitioner or its parent corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	iii
RULE 29.6 STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF CITED AUTHORITIES	vii
TABLE OF APPENDICES	xii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES OR OTHER PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION ...	4
I. The Court Should Grant *Certiorari* To Resolve The Question of Whether Failure To Cooperate With The EEOC Bars A Person From Maintaining A Private Action Under Title VII.	4
A. The circuits are divided on the effects of a plaintiff's failure to cooperate with the investigation and conciliation process mandated by Title VII.	4

Contents

Page

B. Title VII includes a duty to cooperate with the EEOC. 7

1. The cooperation requirement follows directly from Title VII's mandate that the EEOC investigate and conciliate charges of discrimination. 7

2. Nothing in this Court's jurisprudence permits a plaintiff to maintain a Title VII action despite refusal to cooperate with the EEOC. 10

3. The duty to cooperate is consistent with provisions allowing termination of the EEOC's investigation without a determination as to reasonable cause. 12

C. The Seventh Circuit's practical objections to a cooperation requirement are unfounded. 13

D. Guidance from this Court is needed to remedy the serious practical difficulties likely to result from the decision below, and to provide clear guidance to the lower courts, the EEOC, and potential Title VII plaintiffs. 16

Contents

Page

II. The Court Should Grant *Certiorari* To Review The Court of Appeals' Ruling That A Minor Plaintiff Need Not Prove That Harassment Was "Unwelcome" Or That She Perceived Her Work Environment to be Hostile or Abusive In Order To Prevail On Her Title VII Claim. . . 18

A. The decision below was a clear departure from this Court's Title VII jurisprudence. 18

B. The policy justifications cited by the court of appeals do not justify its departure from *Meritor* and *Harris*. 21

1. Requiring a plaintiff to show that alleged harassment was unwelcome and subjectively perceived as hostile or abusive does not undermine state laws restricting sexual contact with minors. 21

2. The rule announced by the Court of Appeals will complicate, not simplify trial of this and similar cases. 22

C. The decision below is sufficiently important to merit review by this Court. 25

CONCLUSION 28

TABLE OF CITED AUTHORITIES

Page

Cases:

Adair v. Broadlawns Med. Ctr., 102 F. Supp.2d 1092 (S.D. Iowa 1999) 6

Alexander v. Gardner Denver Co., 415 U.S. 36 (1974) 8, 11, 13

Buel v. Asse Int'l, Inc., 233 F.3d 442 (7th Cir. 2000) 24

Burton v. Great Western Steel Co., 833 F. Supp. 1266 (N.D. Ill. 1993) 6

Carr v. Alison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007 (7th Cir. 1994) 20

Dates v. Phelps Dodge Magnet Wire Co., 604 F. Supp. 22 (N.D. Ind. 1985) 6

Davis v. Mid-South Milling Co., Inc., Case No. 89-2829, 1990 U.S. Dist. LEXIS 20928 (W.D. Tenn. Dec. 14, 1990) 6

EEOC v. R&R Ventures, 244 F.3d 334 (4th Cir. 2001) 23

Errichetti v. Mass. Water Resources Auth., 30 F. Supp. 2d 270 (D. Mass. 2004) 6

Green v. Heidelberg U.S.A., 854 F. Supp. 511 (N.D. Ohio 1994) 6

Cited Authorities

Page

Harris v. Forklift Systems, 510 U.S. 17 (1993) 22, 23, 24, 25

Haydt v. Loikits, Case No. 99-4342, 2000 U.S. Dist. LEXIS 18202 (E.D. Penn. Dec. 19, 2000) 6

Holland v. The Project Return Found., Case No. 96 Civ. 5330(PKL), 1998 U.S. Dist. LEXIS 18030 (S.D.N.Y. Nov. 13, 1998) 6

Jasch v. Potter, 302 F.3d 1092 (9th Cir. 2002) 14

Jones v. ILA Local 1803, Case No. 02 C 4975, 2004 U.S. Dist. LEXIS 14098 (N.D. Ill. July 22, 2004) 6

K.M. v. Publix Super Markets, Inc., 895 So.2d 1114 (Fla. Ct. App. 2005) 25

Kozlowski v. Extendicare Health Servs., Inc., No. 99-4338, 2000 U.S. Dist. LEXIS 1493 (E.D. Pa. Feb. 17, 2000) 6

Martini v. Fed Nat'l Mortgage Assoc., 178 F.3d 1336 (D.C. Cir. 1999) 6, 7, 12

McBride v. Citgo Petroleum, 281 F.3d 1099 (10th Cir. 2002 5

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 10, 11

Mercy v. City of Cedar Rapids, 79 F. Supp.2d 1055 (N.D. Iowa 1999) 6

Cited Authorities

Page

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) 18, 21, 24

Mohaso Corp. v. Silver, 447 U.S. 807 (1980) 10

Morris v. Albertson, Inc., No. 01 C 2099, 2001 U.S. Dist. LEXIS 12406 (N.D. Ill., Aug. 17, 2001) ... 6

Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977) 8, 9

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) 22, 23, 25

Perez v. Communications Workers of America, Case No. 03-CV-3740(DGT), 2005 U.S. Dist. LEXIS 42179 (E.D.N.Y. Sept. 6, 2005) 6

In re Randall M., No. 92-0392-FT, 492 N.W.2d 191, 1992 Wisc. App. LEXIS 702 (Wis. Ct. App. Aug. 12, 1992) 26

Shikles v. Sprint/United Management Co., 426 F.3d 1304 (10th Cir. 2005) 5, 10

U.S. v. Oakland Cannabis Buyers' Coop, 532 U.S. 483 (2001) 25

Walker v. United Parcel Service, Inc., 240 F.3d 1268 (10th Cir. 2001) 7

Cited Authorities

Page

Statutes and Regulations:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000e-2(a) 1, 18

42 U.S.C. § 2000e-5(b) ..... *passim*

42 U.S.C. § 2000e-5(f)(1) 2, 12

29 C.F.R. § 1601.18(b) 2, 7, 10

29 C.F.R. § 1608.28(a)(2) 7, 12

720 ILCS 5/12-16(d) 2, 22

16 Mass. Ann. Laws ch. 265, § 23 (Matthew Bender, 2006) 27

16 Mass. Ann. Laws ch. 272, § 4 (Matthew Bender, 2006) 27

Wisc. Stat. 948.09 (2006) 26

Cited Authorities

Page

Other Authorities:

H.R. Rep. 92-238 (1971), reprinted at 1972 U.S.C.C.A.N. 2137 12

Enforcement Statistics and Litigation, United States Equal Employment Opportunity Commission, http://www.eeoc.gov/stats/vii.html, viewed Nov. 15, 2006 14

"Employment Experience of Youths: Results from a Longitudinal Survey," U.S. Department of Labor, Bureau of Labor Statistics, Dec. 7, 2000, available at ftp://ftp.bls.gov/pub/news.release/History/nlsyth.12072000.news, viewed November 18, 2006 26

"Annual Averages – Household Data, Employment Status of the Civilian Non-Institutional Population by Age, Sex and Race, U.S. Department of Labor, Bureau of Labor Statistics," available at ftp://ftp.bls.gov/pub/special.requests/lf/aat3.txt, viewed November 18, 2006 26

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided July 28, 2006 ..... 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The Northern District Of Illinois, Eastern Division Dated April 6, 2005 ..... 26a

Appendix C — Order Of The United States Court Of Appeals For The Seventh Circuit Denying Petitions For Rehearing Dated August 31, 2006 ..... 41a

Appendix D — Relevant Statute 43a

PETITION FOR A WRIT OF CERTIORARI

Petitioner Oberweis Dairy, Inc. ("Oberweis") respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals is reported at 456 F.3d 704, and is reproduced in the Appendix to this Petition ("Pet. App.") at Appendix A, Pet. App. 1a. The judgment of the United States District Court for the Northern District of Illinois is set forth in an unpublished Memorandum Opinion and Order dated April 6, 2005, which is reproduced in Appendix B, Pet. App. 26a. The Seventh Circuit subsequently denied cross-petitions for rehearing *en banc*, in an unpublished order that is reproduced in Appendix C, Pet. App. 41a.

JURISDICTION

The court of appeals entered judgment on July 28, 2006, Pet. App. 1a, and denied rehearing *en banc* on August 31, 2006, *id.* at 41a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

42 U.S.C. § 2000e-2(a), provides, in pertinent part:

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

29 C.F.R. § 1601.18(b) provides:

> Where the person claiming to be aggrieved fails to provide requested necessary information, fails or refuses to appear or to be available for interviews or conferences as necessary, fails or refuses to provide information requested by the Commission pursuant to Sec. 1601.15(b), or otherwise refuses to cooperate to the extent that the Commission is unable to resolve the charge, and after due notice, the charging party has had 30 days to respond, the Commission may dismiss the Charge.

The provisions of 42 U.S.C. § 2000e-5(b) and (f)(1) are lengthy and, therefore, are set forth in Appendix D, Pet. App. 43a, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

Jane Doe sued Oberweis, her former employer, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Doe claims that she was sexually harassed by another former Oberweis employee, Matthew Nayman. It is uncontested that Doe and Nayman had sex at Nayman's apartment, that Doe was just under seventeen years old at the time, and that Nayman was 25. It is also uncontested that Nayman did not forcibly rape Doe: disobeying her mother's instruction not to socialize with Nayman, Doe voluntarily went alone to Nayman's apartment, where she and Nayman had sex. Because Illinois law sets 17 as the age of consent, Nayman was convicted of aggravated criminal sexual abuse of a minor under 720 ILCS 5/12-16(d).

Oberweis first learned of this incident when Doe's mother telephoned the manager at the store where Doe worked and stated that she was pressing charges against Nayman. Oberweis immediately began an investigation of the incident, pursuant to its sexual harassment policy, which included a procedure for bring such complaints to the attention of management. Although the company repeatedly asked Doe, through her mother, to provide the facts of her allegations against Nayman, she did not do so. Nayman did not work for Oberweis after the company was notified of Doe's allegations.

Doe subsequently filed a charge of discrimination with the EEOC, in which she alleged that she "was subjected to inappropriate sexual advances and comments by my supervisor James Matthew Nayman," but did not provide any further detail regarding Mr. Nayman's alleged conduct toward her. Over a three-month period, the investigator assigned to Doe's charge repeatedly contacted Doe's attorney to schedule an interview with Doe. Doe's lawyer's assistant initially advised the EEOC that Doe "respectfully declined an interview." However, Doe's lawyer called back the next day and told the investigator in a voice message that she would call later in the day to schedule the interview. She never did so. Thereafter, the investigator sent Doe's attorney at least two letters reiterating the request for an interview, and advising that the EEOC's regulations required Doe to cooperate.

In the second letter, the investigator warned that the EEOC would dismiss Doe's charge if Doe was not made available for an interview within 33 days. Doe's attorney responded with a letter stating that Doe would not "be interrogated by you" but that her attorney would "answer any questions you may have regarding her charge." Consequently, the EEOC's district director dismissed Doe's charge for failure to cooperate.

The district court granted Oberweis's Motion for Summary Judgment on Doe's Title VII claim. First, the court held that Doe's claim was barred because she refused the EEOC's repeated requests for an interview, leading the EEOC to dismiss her charge for lack of cooperation. Pet. App. 32a-36a. The district court also held that Doe could not show that she was sexually harassed because she failed to raise a genuine issue of material fact as to whether the principal act of harassment – her sexual encounter with Nayman – was unwelcome. Pet. App. 36a-38a.[1]

[1] The district court also held that the encounter between Doe and Nayman was not actionable because it was not related to the workplace, and that Nayman's conduct toward Doe in the workplace was not in itself sufficiently severe or pervasive to support a claim of sexual (Cont'd)

The Seventh Circuit reversed the district court's judgment. With respect to Doe's refusal to respond to the EEOC's requests for an interview, the court of appeals held that plaintiffs have no obligation to cooperate with the EEOC's investigation as a prerequisite to maintaining a private action under Title VII. Pet. App. 3a-12a. The Seventh Circuit further held that Doe was not required to show that the sexual encounter with Nayman was unwelcome in order to maintain her Title VII claim, because the sex was not consensual under Illinois state law. Pet. App. 12a-20a.

On August 8 and 11, 2006, Doe and Oberweis, respectively, filed timely petitions for rehearing *en banc*. The Seventh Circuit denied both petitions by order dated August 31, 2006. Pet. App. 41a-42a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant *Certiorari* To Resolve The Question of Whether Failure To Cooperate With The EEOC Bars A Person From Maintaining A Private Action Under Title VII.

A. The circuits are divided on the effects of a plaintiff's failure to cooperate with the investigation and conciliation process mandated by Title VII.

The statutory prerequisites to suit under Title VII are set forth in 42 U.S.C. § 2000e-5. Under § 2000e-5(b), the process begins when a charge of discrimination is filed with the EEOC by or on behalf of a party claiming to be aggrieved by a violation of the statute. "Whenever a charge is filed," the EEOC

(Cont'd)

harassment. Pet App. 38a-39a. The Seventh Circuit found that Doe presented enough evidence to survive summary judgment on the question of whether the sexual encounter outside of work was related to Doe's employment and whether Doe welcomed Nayman's workplace conduct, Pet. App. 19a-20a, but did not directly address the question of whether the workplace conduct alone would have been sufficiently "severe" or "pervasive" to support Doe's claim.

"shall make an investigation thereof." *Id.* If the EEOC "determines after such investigation that there is not reasonable cause to believe that the charge is true," it must dismiss the charge, *id.*, and notify the charging party of her right to file suit within 90 days, 42 U.S.C. 2000e-5(f)(1). If the EEOC finds reasonable cause, it must attempt to resolve the charge through a process of "conference, conciliation and persuasion." 42 U.S.C. 2000e-5(b). If the Commission neither enters into a conciliation agreement settling the charge nor files suit in its own name within 180 days after the charge is filed, it must notify the charging party of her right to file suit within 90 days. 42 U.S.C. 2000e-5(f)(1).

The Seventh Circuit held that a charging party need only file a timely charge with the EEOC, await a notice of right to sue, and file suit within 90 days of receiving such notice in order to maintain a Title VII action. Pet. App. at 3a. That holding is in direct conflict with the law of at least one other circuit as well as numerous district courts, and in tension with other circuit court decisions.

Most notably, the Tenth Circuit has held that a duty of cooperation is inherent in the statutory mandate that the EEOC investigate and conciliate charges of discrimination:

> The need for cooperation with the EEOC is inherent in the EEOC filing requirements already in the statute and is integral to the overall structure of the statute. Such cooperation is necessary to ensure that a charge is not a sham and that it instead provides enough information to make conciliation attempts meaningful.

Shikles v. Sprint/United Management Co., 426 F.3d 1304, 1314 (10th Cir. 2005) (holding that Title VII, the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, all require cooperation with the EEOC as a prerequisite to suit); *McBride v. Citgo Petroleum*, 281 F.3d 1099 (10th Cir. 2002) (same, with

respect to ADA, which incorporates Title VII procedural requirements). District courts in the First, Second, Third, Sixth, and Eighth Circuits have reached similar conclusions, as did district courts in the Seventh Circuit prior to the decision below.[2]

The decision below is also incompatible with the holding of the District of Columbia Circuit in *Martini v. Fed. Nat'l Mortgage Assoc.*,178 F.3d 1336 (D.C. Cir. 1999). There,

---

[2] *See, e.g., First Circuit*: *Errichetti v. Mass. Water Resources Auth.*, 30 F. Supp. 2d 270 (D. Mass. 2004) (Title VII claim barred by failure to cooperate with the EEOC or state agency); *Second Circuit*: *Perez v. Communications Workers of America*, Case No. 03-CV-3740(DGT), 2005 U.S. Dist. LEXIS 42179 (E.D.N.Y. Sept. 6, 2005) (same); *Holland v. The Project Return Found.*, Case No. 96 Civ. 5330(PKL), 1998 U.S. Dist. LEXIS 18030 (S.D.N.Y. Nov. 13, 1998) (same); *Third Circuit: Haydt v. Loikits*, Case No. 99-4342, 2000 U.S. Dist. LEXIS 18202 (E.D. Penn. Dec. 19, 2000)(same); *Kozlowski v. Extendicare Health Servs., Inc.*, No. 99-4338, 2000 U.S. Dist. LEXIS 1493 (E.D. Pa. Feb 17, 2000) (same); *Sixth Circuit: Davis v. Mid-South Milling Co., Inc.*, Case No. 89-2829, 1990 U.S. Dist. LEXIS 20928 (W.D. Tenn. Dec. 14, 1990) (Title VII claim barred due to failure to cooperate with EEOC); *Green v. Heidelberg U.S.A.*, 854 F. Supp. 511 (N.D. Ohio 1994) (same); *Seventh Circuit*: *Jones v. ILA Local 1803,* Case No. 02 C 4975, 2004 U.S. Dist. LEXIS 14098 (N.D. Ill. July 22, 2004) (same); *Morris v. Albertson, Inc.*, No. 01 C 2099, 2001 U.S. Dist. LEXIS 12406 (N.D. Ill., Aug. 17, 2001) (allowing plaintiffs who fail to cooperate with the EEOC to maintain Title VII actions "would be to allow them to emasculate Congressional intent by short circuiting the twin objectives of investigation and conciliation"); *Burton v. Great Western Steel Co.*, 833 F. Supp. 1266, 1273 (N.D. Ill. 1993) (exhaustion of remedies requirement would be "hollow" if plaintiff could sue in federal court after refusing to cooperate with state agency investigating his charge); *Dates v. Phelps Dodge Magnet Wire Co.*, 604 F. Supp. 22, 27 (N.D. Ind. 1985) (Title VII claim barred by plaintiff's failure to cooperate with the EEOC); *Eighth Circuit: Mercy v. City of Cedar Rapids*, 79 F.Supp.2d 1055 (N.D. Iowa 1999) (Title VII plaintiffs must exhaust administrative remedies, which includes making specific charges and providing information necessary to the investigation); *Adair v. Broadlawns Med. Ctr.*, 102 F.Supp.2d 1092 (S.D. Iowa 1999) (Title VII action barred where plaintiff failed to cooperate with state agency's investigation).

the court held that an EEOC regulation allowing the agency to dismiss charges less than 180 days after filing, 29 C.F.R. § 1608.28(a)(2), violated the mandate of 42 U.S.C. § 2000e-5(b), that the EEOC investigate all charges of discrimination, "[b]ecause the power to authorize early private suits inevitably and impermissibly allows the EEOC to relax its aggregate effort to comply with its statutory duty to investigate every charge filed . . . ." 178 F.3d at 1347. *Martini* makes little sense if a charging party can circumvent the statutory 180-day investigation period by simply refusing to cooperate with the EEOC's investigation efforts, thus inducing the EEOC to dismiss the charge and issue a notice of right to sue pursuant to 29 C.F.R. § 1601.18(b). Rather, requiring a charging party to wait at least 180 days after filing her charge to initiate a lawsuit furthers the EEOC's mandate to investigate every charge only if the charging party has some duty to provide the EEOC enough information to conduct a meaningful investigation.

This Court need not address the issue raised in *Martini* in order to answer the question raised by the decision below – as illustrated by the fact that the Tenth Circuit has rejected the logic of *Martini* even as it requires plaintiffs to cooperate with the EEOC. *Walker v. United Parcel Service, Inc.*, 240 F.3d 1268, 1273-1277 (10th Cir. 2001). Nevertheless, this disagreement among the circuit courts as to the validity of the EEOC's regulations governing early dismissal of charges highlights the need for guidance from this Court regarding the statutory prerequisites to suit under Title VII.

B. Title VII includes a duty to cooperate with the EEOC.

1. The cooperation requirement follows directly from Title VII's mandate that the EEOC investigate and conciliate charges of discrimination.

While not disputing that cooperation is necessary for the EEOC to investigate and conciliate charges, the court below

nevertheless held that Title VII does not mandate any cooperation by the charging party, and that the EEOC's dismissal of a charge for failure to cooperate has no bearing on whether the charging party may subsequently maintain a private Title VII action. That conclusion would be correct only if the EEOC process was meant merely to provide a "cooling off" period before the parties proceed to federal court. This is not what Congress intended.

While private litigation is an important part of Title VII's enforcement scheme, Congress made cooperation and conciliation the preferred means of eliminating unlawful employment discrimination:

> Cooperation and voluntary compliance were selected as the preferred means for achieving [Title VII's] goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation and persuasion before the aggrieved party was permitted to file a lawsuit.

Alexander v. Gardner Denver Co., 415 U.S. 36, 44 (1974).

To ensure that cooperation and voluntary compliance are not pushed aside in favor of litigation, the statute requires the EEOC to investigate each charge of discrimination, determine whether there is reasonable cause to believe the charge is true, and, if so, attempt to settle disputes in an informal, noncoercive fashion. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977). While Congress recognized that limited resources and large caseloads might prevent the EEOC from fulfilling its mandate in every case, the Commission's duty to investigate and endeavor to informally resolve charges is nevertheless both mandatory and unqualified. *See* 42 U.S.C. 2000e-5(b) (the EEOC "shall investigate" "whenever" a charge is filed, and "shall" endeavor to eliminate unlawful employment practices

through "conference, conciliation and persuasion" when it finds reasonable cause to believe a charge is true).

The EEOC's mandate to investigate charges also furthers its role in enforcing Title VII through civil lawsuits by allowing, as the Seventh Circuit put it, the "exercise of the administrative equivalent of prosecutorial discretion." However, because cooperation and conciliation are preferred, "[u]nlike the typical litigant against whom a statute of limitations might appropriately run, the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties." *Occidental Life Ins. Co.*, 432 U.S. at 368.

The EEOC's investigation plays an important role even in those cases where the agency determines that there is not reasonable cause to believe that a charge is true. A charging party may file suit even if the EEOC decides after investigation that the claim is groundless. Nevertheless, by requiring both the charging party and the respondent to confront the facts at an early stage, the EEOC's investigation and determination can narrow the issues in dispute, establish the groundwork for later settlement, and discourage filing of baseless suits.

Thus, the EEOC is not just a pre-litigation holding tank, but an agency charged with the crucial role of actively facilitating early, informal resolution of discrimination complaints, before they reach the federal courts. Yet the EEOC cannot meaningfully fulfill this role unless the charging party cooperates with its investigation. Unless the charging party discloses the factual bases of the charge, the EEOC has no way of determining what other investigation may be needed, let alone of deciding whether or not there is reason to believe the charge is true. If the EEOC attempts to investigate notwithstanding a lack of cooperation, it is likely to waste scarce resources that could be used to investigate other charges. Likewise, the EEOC cannot meaningfully endeavor to conciliate a charge unless it understands the facts upon which the charge is based, nor can it exercise its "prosecutorial discretion" to decide whether to file

suit on behalf of an aggrieved party. The EEOC itself has acknowledged these realities by adopting a rule allowing dismissal of a charge if the charging party fails to cooperate after due notice. 29 C.F.R. § 1601.18(b).

Because the EEOC cannot meaningfully fulfill its statutory duties without the cooperation of the charging party, the Tenth Circuit and numerous district courts have concluded that a cooperation requirement is both "inherent in the EEOC filing requirements already in the statute" and "integral to the overall structure of the statute." *Shikles*, 426 F.3d 1314. Oberweis respectfully submits that this conclusion was correct, and that the Seventh Circuit erred by failing to recognize the cooperation requirement inherent in Title VII's enforcement procedures.

2. Nothing in this Court's jurisprudence permits a plaintiff to maintain a Title VII action despite refusal to cooperate with the EEOC.

The court below criticized the court in *Shikles* for noting, then disregarding this Court's "admonition that no requirements beyond those in the statute should be imposed," found in cases such as *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This criticism is misplaced.

Neither *Mohasco* nor *McDonnell Douglas* bear on the question at issue in this case. In *Mohasco*, the Court expressed (in a footnote) its disapproval of an Eighth Circuit decision holding that filings with state agencies be made within 180 days after an alleged act of discrimination. 447 U.S. at 816, n.19. In *McDonnell Douglas*, the Court rejected the argument that a plaintiff must receive a "reasonable cause" finding from the EEOC before filing a private action under Title VII. Unlike the requirement at issue here, these rules were neither based upon nor needed to give effect to the language of the statute. In contrast, the cooperation requirement at issue in this case "is not a completely new requirement; instead, at issue is the natural implication of criteria already in the statute." *Shikles*,

426 F.3d at 1314 (distinguishing *Mohasco* and *McDonnell Douglas*).

Further, the Court has never held that the prerequisites to suit are limited to those recognized by the Seventh Circuit below – namely, filing a timely charge, and receiving and timely acting upon a right to sue letter. In *Alexander,* the Court stated that the plaintiff met the statutory prerequisites to suit when he "(1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue." 415 U.S. at 47. The Court made a similar statement in *McDonnell Douglas*. 411 U.S. at 798. However, in *Alexander*, the EEOC conducted an investigation and issued its right to sue letter after it made a finding of no reasonable cause. *Alexander*, 415 U.S. at 43. In *McDonnell Douglas*, the EEOC engaged in an investigation and conciliation process lasting over two years. 411 U.S. at 796-97. Neither case involved a situation where the charging party's refusal to cooperate prevented the EEOC from carrying out its statutory mandate. The Court's finding that the plaintiffs in those cases complied with the prerequisites to suit thus does not bear upon the cooperation requirement at issue here.

Far from counseling against cooperation as a mandatory prerequisite to suit under Title VII, this Court's rulings make it clear that investigation and conciliation, not litigation, is the cornerstone of Title VII's enforcement regime, and that the EEOC has a duty to investigate and conciliate each charge. Because cooperation from the charging party is needed to make investigation and conciliation meaningful, it follows directly from the requirements of 42 U.S.C. 2000e-5 that a charging party must cooperate with the EEOC as a prerequisite to filing suit under Title VII.

3. The duty to cooperate is consistent with provisions allowing termination of the EEOC's investigation without a determination as to reasonable cause.

The duty to cooperate with the EEOC is not open-ended: Title VII provides that a charging party may sue if the EEOC fails to file its own lawsuit or enter into a conciliation agreement within 180 days after the charge is filed. 42 U.S.C. § 2000e-5(f)(1). This provision reflects a legislative compromise: "Congress well understood that the EEOC's limited resources preclude it from investigating every charge within 180 days . . . but nevertheless "hoped that recourse to the private lawsuit will be the exception and not the rule." *Martini*, 178 F.3d at 1346 (*quoting* 118 Cong. Rec. 7168). Accordingly, it set a time limit on the EEOC's investigation to protect aggrieved individuals from the "administrative quagmire which occasionally surrounds a case caught in an overloaded administrative process." H.R. Rep. 92-238 (1971), reprinted at 1972 U.S.C.C.A.N. 2137, 2148. That Congress mandated investigation and conciliation without exception notwithstanding its expectation that the EEOC might be unable to comply in every case makes it clear that Congress intended the 180-day investigation period to be put to productive use, not simply wiled away. Consequently, far from making cooperation moot, the limited time available for the EEOC to complete its investigation makes it all the more imperative that the charging party provide prompt assistance when asked to do so by the EEOC.

The need for cooperation also is not reduced by the fact that the EEOC has adopted a rule, 29 C.F.R. § 1601.28(a)(2), permitting dismissal of a charge before the 180 day time period has expired. This rule does not excuse parties from filing a charge with the EEOC, and it provides for early dismissal only in those cases where the rationale for keeping the charge before the EEOC is at its weakest – *i.e.*, where the EEOC has determined that it will be unable conclude its investigation within the allotted time, and that the parties would not be better served by the

EEOC's retention of the charge. *Id.* Accordingly, the rule does not speak to those cases in which the EEOC's own limited resources do not preclude completion of an investigation within 180 days.

This is just such a case. Doe did not request a notice of right to sue, and the EEOC did not dismiss her charge because it was unable for internal reasons to complete its investigation within 180 days. Rather, its investigation was stymied by Doe's refusal to cooperate. In such a case, allowing the charging party to file a Title VII action notwithstanding her failure to cooperate with the EEOC reduces the investigation and conciliation process to a temporary purgatory on the road to federal court. This is not what Congress intended when it mandated investigation and conciliation as the preferred means of enforcing Title VII. *See, e.g., Alexander*, 415 U.S. at 44.

C. The Seventh Circuit's practical objections to a cooperation requirement are unfounded.

The Seventh Circuit also asserts that, statutory mandates aside, "the decisive objection to the Tenth Circuit's position" is that it would "allow employers to inject such an issue by way of defense in every Title VII case," thus "cast[ing] a pall over litigation under that statute." Pet. App. 8a-9a. According to the court of appeals, this is because a cooperation rule would require the courts to determine whether a charging party has complied with the EEOC's efforts "in good faith." *Id.* This, the court states, would result in difficult questions, such as whether a charging party can sue after appearing for an interview but answering questions "cryptically," or failing to bargain in good faith over an offer of settlement. *Id.*

The courts need not go down this slippery slope to hold that a plaintiff who, without good reason, stymies the EEOC's investigation by failing consent to an interview or to provide information specifically requested by the EEOC, has not complied with the prerequisites to suit under Title VII. Numerous courts have held that cooperation with the EEOC is a prerequisite

to suit. There is no evidence that these courts have experienced any particular difficulty in enforcing this requirement, let alone that the rule has led to such abuses by defendants as to "cast a pall" over Title VII litigation generally.

There is simply no risk that the adequacy of the plaintiff's cooperation with the EEOC investigation will become an issue in "every Title VII case." When the EEOC makes a determination as to reasonable cause or lack thereof, the courts can safely conclude that the charging party's cooperation was at least sufficient to allow the EEOC to carry out its duties. *See Jasch v. Potter*, 302 F.3d 1092, 1095 (9th Cir. 2002) (in federal sector Title VII case, plaintiff's failure to cooperate with a request for information did not bar his suit because the agency issued a determination on the merits instead of dismissing for lack of cooperation). Conversely, the courts need only consider the adequacy of a plaintiff's cooperation with the EEOC in those few cases, like this one, where the plaintiff's refusal to cooperate is sufficiently clear and brazen that the agency itself dismisses the charge for lack of cooperation. *Id.* (a complainant who fails to respond to an agency request for information does so "at his own peril"). Although the number can be expected to rise if the decision below stands, this currently represents only a small fraction of the charges resolved by the Commission.[3]

In those relatively few cases where failure to cooperate is an issue, there is little reason to believe that the courts will have difficulty deciding whether the plaintiff's failure to cooperate prevented the EEOC from conducting a meaningful investigation. This case illustrates the point. For nearly three

---

[3] According to the EEOC's published statistics, the agency resolved 46,885 Title VII charges in fiscal year 2005. Of those, 68.8% were resolved with a determination of reasonable cause, or lack thereof. In contrast, only 15.5% were resolved through "administrative closure," which includes charges closed for lack of cooperation by the charging party and various other reasons, such voluntary withdrawals, and charging party's refusal to accept full relief. *See* http://www.eeoc.gov/stats/vii.html, visited Nov. 15, 2006.

months, Doe simply ignored repeated requests by the EEOC investigator for an interview. When the EEOC threatened to dismiss her charge as a result, Doe's lawyer told the investigator that Doe "would not be interrogated by you," ostensibly because the lawyer and Doe's psychotherapist thought that an interview might upset Doe. Had Doe presented actual evidence that her therapist advised her not to submit to an EEOC interview for valid mental health reasons, the district court would have been fully competent to evaluate that evidence and decide whether Doe had a legitimate reason to refuse an interview, and whether she offered a viable alternative. Doe offered no such evidence.

While Doe's lawyer gave the EEOC the names of ten witnesses, none of them were present at the time of the sexual encounter between Doe and Nayman, and none of them described any inappropriate conduct toward Doe. Accordingly, without information from Doe, the EEOC found itself unable to determine whether there was reasonable cause to believe her charge was true. While Doe's lawyer offered to answer the investigator's questions (three months after the EEOC first asked to interview Doe, and only after it threatened to dismiss Doe's charge), the EEOC reasonably determined that the statement of a trained lawyer who did not witness any of the events relating to Doe's charge was an inadequate substitute for an interview with Doe herself.

A duty to cooperate with the EEOC's investigation also does not imply a duty to bargain in good faith over a settlement offer. The charging party's duty to cooperate with the EEOC's investigation arises from the statute because the EEOC cannot meaningfully investigate or attempt to conciliate a charge without information from the charging party. However, so long as the charging party provides the EEOC enough information to do its job, the EEOC can both conduct a meaningful investigation and endeavor to eliminate any unlawful employment practice through "conference, conciliation, and persuasion," even if the charging party chooses not to negotiate.

D. Guidance from this Court is needed to remedy the serious practical difficulties likely to result from the decision below, and to provide clear guidance to the lower courts, the EEOC, and potential Title VII plaintiffs.

The new rule announced by the Seventh Circuit in this case will have a serious and negative impact on the enforcement procedures set forth in Title VII (as well as the Americans With Disabilities Act and Age Discrimination in Employment Act). The court acknowledges that this rule will disincent plaintiffs from cooperating with the EEOC, and that fewer disputes will be resolved at the administrative stage, resulting in more lawsuits. However, it reasons that this additional burden will be a slight one because the case law reflects few instances of non-cooperation. Pet. App. 6a-7a.

The Seventh Circuit underestimates the negative impact of its decision. Before this case, the only circuit court to address the issue and numerous district courts – including district courts in the Seventh Circuit – had held that cooperation is a prerequisite to suit. Now that these rulings are in question, refusal to cooperate with the EEOC is likely to become more commonplace, both in this circuit and elsewhere. Moreover, the cases in which a charging party refuses to cooperate with the EEOC are often those in which a charging party sees it as being in his or her interest to prevent the facts underlying the charge from being known. Yet it is in precisely these cases that the administrative process is most needed – to expose flaws in the claim, to clarify positions and narrow issues for litigation, and to attempt resolution before the claim reaches the courts.

In the instant case, it is difficult to ascertain Doe's precise motivation for refusing to cooperate with the EEOC: at various times she has cited (though provided no evidence of) her therapist's advice, as well as her unfounded belief that the EEOC unnecessarily revealed her identity and personal information to the witnesses named by her attorney. However, the Seventh Circuit's suggestion that there is "no indication that by failing

to sit for an interview [Doe] made it more difficult to resolve her dispute with defendant before bringing suit]" is patently incorrect. Because Doe prevented the EEOC from reaching a determination on the merits of her charge, it is not possible to say what that determination would have been. Doe presumably would maintain that there was reasonable cause to support her charge. If the EEOC agreed, it would have been required to attempt conciliation, possibly leading to an early settlement. Conversely, if the EEOC had determined that there was not reasonable cause, Doe's cooperation might still have clarified her claims, narrowed the issues for litigation, and established some groundwork for settlement, either before litigation or at an early stage in the case.

Regardless of what might have happened in this case had Doe fulfilled her duty to cooperate with the EEOC, the fact remains that Congress deemed the EEOC's investigation sufficiently important to mandate investigation of every charge filed, and conciliation efforts in every case where the EEOC finds reasonable cause. That mandate becomes meaningful only if plaintiffs provide the EEOC with the information it needs to determine whether or not a charge is supported by reasonable cause. Enforcing that requirement will not "cast a pall" over Title VII litigation. If a "pall" is cast, it is due not to any difficulty in enforcing a cooperation rule, but because there is now a split of authority as to whether such a duty exists at all.[4] Consequently, a decision of this Court is needed to resolve the split between the circuits so that potential plaintiffs, the EEOC, and the courts have clear guidance regarding a charging party's duty to cooperate with the EEOC and the effects of a failure to comply with that duty. Oberweis therefore respectfully asks this Court to grant its petition for certiorari on this issue.

---

[4] Oberweis itself is directy affected by this split, in that the company operates in both the Seventh and Eighth Circuits.

II. The Court Should Grant *Certiorari* To Review The Court of Appeals' Ruling That A Minor Plaintiff Need Not Prove That Harassment Was "Unwelcome" Or That She Perceived Her Work Environment to be Hostile or Abusive In Order To Prevail On Her Title VII Claim.

A. The decision below was a clear departure from this Court's Title VII jurisprudence.

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Sexual harassment is actionable under Title VII if it is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). Conduct is actionable only if it is both objectively and subjectively hostile or abusive. "[I]f the victim does not subjectively perceive the environment as hostile or abusive, the conduct has not actually altered the terms and conditions of the victim's employment, and there is no Title VII violation." *Harris v. Forklift Systems,* 510 U.S. 17, 21-22 (1993). For that reason, "the gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'." *Meritor,* 477 U.S. at 68.

As the Seventh Circuit acknowledged, there is no dispute that Doe "was an active participant in, rather than a passive victim of, the principal discriminatory act of which she complains – the act of sexual intercourse with Nayman." Pet. App. 17a. The uncontested facts recited by the district court make this clear:

> Beginning in May 2002, Plaintiff visited Nayman's apartment on a number of occasions with friends . . . . Plaintiff's mother told Plaintiff not to go to Nayman's apartment anymore, but Plaintiff continued to visit Nayman . . . .

> On a day Plaintiff did not work in August 2002, Plaintiff, Nayman, and another friend were at Nayman's apartment. After eating dinner with her parents, Plaintiff returned to Nayman's house and gave her friend a ride home. Plaintiff intended to return to Nayman's apartment with a few other friends but eventually decided to return alone because she had nothing else to do. Plaintiff intended to "hang out," as she normally would, at Nayman's apartment. While they were alone at the apartment, Plaintiff and Nayman engaged in a sexual encounter. During the course of this sexual encounter, Plaintiff asked Nayman to get a condom, which Nayman did . . . .
>
> After the sexual encounter, Plaintiff asked Nayman to purchase alcohol for her friend's party. Plaintiff also asked Nayman to attend the party. Plaintiff picked up Nayman at his apartment, went to a store to purchase alcohol, then went to the party. Plaintiff, Nayman, and several others spent the night at the house where the party was occurring. The next morning, Plaintiff drove Nayman home. Later that day, Plaintiff called Nayman to ensure that he was okay.[5]

Pet. App. 29a-30a (record citations omitted.) Doe herself never testified that her encounter with Nayman was unwelcome. In the absence of any contrary evidence, the district court found that there was no genuine issue of material fact as to whether Doe regarded Nayman's conduct as unwelcome. Pet. App. 36a-38a.

---

[5] According to Doe, Nayman told her during this conversation that he was worried that Doe's mother would learn that he had purchased alcohol for the party, and might get him in trouble. Doe reassured him that he would not get in trouble. Jane Doe Deposition Transcript, Oberweis Supp. Appendix on Appeal, Ex. 5 at 33-36.

If Doe had been three weeks older at the time of her encounter with Nayman, there would be no question that her Title VII claim fails as a matter of law under *Meritor* and *Harris*. However, the Seventh Circuit held that Doe may maintain her claim regardless of whether she welcomed her encounter with Nayman or felt that his conduct was hostile or abusive, because her consent to sex with Nayman was ineffective for purposes of state law. In equating "welcomeness" for purposes of Title VII with "consent" under state law, the court of appeals departs from the clear holdings of *Meritor* and *Harris*. In *Meritor*, the Court clearly distinguished between "welcomeness" and "voluntariness" or "consent" under state law. Like the Seventh Circuit in this case, the district court in *Meritor* "focused on the 'voluntariness' of [the plaintiff's] participation in the claimed sexual episodes" – *i.e.*, whether the plaintiff consented to sex for purposes of state law. This was error: "The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." *Meritor*, 477 U.S. at 68.

As the Court later made clear in *Harris*, even conduct which a reasonable person might regard as abusive cannot give rise to Title VII liability if the plaintiff is not subjectively bothered by it, because such conduct does not affect the terms and conditions of the plaintiff's employment. 510 U.S. at 21-22. Thus, "[w]hile 'voluntariness' in the sense of consent is not a defense" to a Title VII harassment claim, evidence relating to whether a plaintiff found a particular sexual advance unwelcome, such as the plaintiff's sexually provocative speech or dress, "is obviously relevant" to the existence of sexual harassment. *Meritor*, 477 U.S. at 69. As the Seventh Circuit succinctly put it in an earlier case, "'[w]elcome sexual harassment' is an oxymoron." *Carr v. Alison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1008 (7th Cir. 1994).

By excusing Doe from the need to prove that she did not welcome sex with Nayman and that she found his actions hostile

or abusive, the court of appeals also excuses Doe from showing that her encounter with Nayman had any effect on the terms or conditions of her employment. However, as is clear from the statute and this Court's decisions, that is the heart of a Title VII sexual harassment claim.

B. The policy justifications cited by the court of appeals do not justify its departure from *Meritor* and *Harris*.

Because this Court's jurisprudence provides no basis for the rule announced by the court of appeals, the court justifies its decision in terms of policy rather than law. Specifically, the court of appeals states that its new rule is needed to afford proper deference to state law, and to avoid "intractable inquiries into maturity." Even if such policy issues were the proper province of the courts rather than Congress, neither of these considerations provides a sound basis for the court's ruling.

1. Requiring a plaintiff to show that alleged harassment was unwelcome and subjectively perceived as hostile or abusive does not undermine state laws restricting sexual contact with minors.

The court of appeals first justifies its rejection of *Meritor* and *Harris* by asserting that its decision is necessary "to avoid undermining valid state policy by reclassifying sex that the state deems nonconsensual as consensual . . . ." Pet. App. 13a-14a. As discussed above, welcomeness for purposes of Title VII is legally separate and distinct from "consent" to sex under state law. Thus, by granting summary judgment on Doe's Title VII claim because she failed to show that her encounter with Nayman was unwelcome, the district court did not "reclassify" nonconsensual sex as consensual.

In asserting that welcomeness must be equated with consent in order to give effect to state age of consent laws, the Seventh Circuit implicitly presumes that the purposes of Title VII and the state law under which Nayman was convicted are the same.

They are not. 720 ILCS 5/12-16(d) prohibits sexual intercourse with a minor under 17 years old without regard to how the minor subjectively perceives the matter. It makes no difference whether a minor consents to sex, actively welcomes it, or even initiates it. Rather, as is appropriate for a statute carrying serious criminal penalties, the law creates a bright-line standard prohibiting certain specific acts.

Title VII, on the other hand, contains no *per se* prohibition on sexual conduct. "The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace . . . ." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). Rather, it forbids only behavior that alters the "conditions" of the victim's employment. *Id.* Conduct that an employee does not find hostile or abusive, or which the employee actually welcomes, may be unlawful for other reasons, but does not give rise to a claim under Title VII. *Harris*, 510 U.S. at 21-22.

Given that Illinois criminal law and Title VII have entirely different purposes, and that the elements necessary to prove a violation of 720 ILCS 5/12-16(d) are distinct from those of a Title VII claim, merely recognizing that a violation of state law does not necessarily give rise to a claim under Title VII does not undermine either law. The district court's ruling that Doe could not maintain a Title VII claim because she welcomed Nayman's conduct does not excuse that conduct morally or legally, any more than dismissal of a Title VII claim based on a racially motivated assault unconnected with the workplace precludes enforcement of hate crime laws. The question is not whether what Nayman did was wrong, but whether it was a wrong covered by Title VII. It was not.

2. The rule announced by the Court of Appeals will complicate, not simplify trial of this and similar cases.

While this Court has repeatedly set forth the analysis to be employed by lower courts in determining whether conduct is

sexual harassment actionable under Title VII, the court of appeals reasoned that its new rule governing Title VII claims by minors was necessary "to simplify employment-discrimination litigation" and "to avoid intractable inquiries into maturity." Pet. App. 14a. According to the court of appeals, this ruling is consistent "with the common practice of using state law to fill gaps in federal law." *Id.*

The court incorrectly presumes that there is a gap in Title VII to be filled. While acknowledging that the framework it set out in *Harris* "is not, and by its nature cannot be, a mathematically precise test," this Court nevertheless held that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." *Harris*, 510 U.S. at 22-23. Accordingly, courts and juries must carefully consider "the social context in which particular behavior occurs and is experienced by its target." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). That context, in an appropriate case, includes a plaintiff's age in relation to the alleged harasser. *See, e.g., EEOC v. R&R Ventures,* 244 F.3d 334, 340 (4th Cir. 2001) (finding that age difference between supervisor and teenage employee was an important factor in determining whether supervisor's conduct was actionable harassment).

By carving out a single dispositive factor – the plaintiff's age – the court of appeals in effect prohibits the trial court and jury from considering any other factors bearing upon her claims, including the subjective factors expressly identified by this Court in *Meritor* and *Harris*. Yet the Seventh Circuit's decision provides no sound explanation as to why a trier of fact, looking at "all the circumstances" including age, could not determine whether a minor plaintiff welcomed the conduct or subjectively perceived it as hostile or abusive. While that inquiry is not "mathematically precise," it is no more "intractable" than those regularly faced by courts and juries in other Title VII harassment cases.

In an earlier case, the Seventh Circuit acknowledged that a state statute fixing the age of consent to sexual contact "cannot be considered a legislative judgment that minors are utterly incapable of avoiding becoming ensnared in sexual relationships." *Buel v. ASSE Int'l, Inc.*, 233 F.3d 442, 450-51 (7th Cir. 2000). Accordingly, in *Buel*, the court held that the jury could consider a minor plaintiff's comparative fault in a negligence case arising from a statutory rape. Applying that reasoning below, the court held that, for purposes of calculating damages, "a jury should be able to sort out the difference between an employer's causal contribution to the statutory rape by its employee of a 16-year-old siren (if that turns out to be an accurate description of Doe) and to similar conduct toward, say, a 12-year-old." Pet. App. 18a.

Thus, even under the rule announced below, the trier of fact must engage in an "inquiry as to maturity" to determine whether Doe was a "16-year-old siren" whose actions caused or contributed to her alleged damages. This inquiry would not be any more "intractable" or complex than an inquiry at the liability stage regarding whether Doe welcomed Nayman's conduct and viewed it as hostile or abusive.

But rather than allow the trial court to conduct this inquiry in light of "all the circumstances" as required by *Meritor* and *Harris*, the Court of Appeals requires the District Court to instruct the jury that Doe was subjected to unwelcome sexual harassment as a matter of law – but then to consider whether Doe actually welcomed the conduct for purposes of determining her damages. Far from simplifying the jury's task, this conceptual disconnect will invite error and confusion. A similar problem arises from the fact that the *per se* harassment rule announced below applies only to sexual harassment claims based upon sexual conduct prohibited by state law. Pet. App. 20a. Accordingly, courts and juries must still make an "inquiry into maturity" in order to resolve any sexual harassment claim by a minor plaintiff based in whole or in part on conduct falling short of that barred by state criminal law.

Applying the totality of the circumstances test set forth by this Court in *Harris* and *Oncale*, the district found that Doe had not presented any evidence – not even her own testimony – from which a reasonable trier of fact could conclude that Doe viewed the encounter with Nayman as unwelcome, or that she perceived it as creating a hostile or abusive working environment. The Seventh Circuit reversed, not because it thought that the district court applied the test incorrectly, but because it felt that a different standard should apply in cases involving minors. However, that decision is one for Congress, not the courts. *See U.S. v. Oakland Cannabis Buyers' Coop,* 532 U.S. 483, 491 n4 (2001) ("social balancing" should be left to Congress).

C. The decision below is sufficiently important to merit review by this Court.

The Court should grant *certiorari* with respect to the second and third questions presented for review not only because the Seventh Circuit's decision was a clear departure from this Court's precedents, but also because that decision will have serious negative consequences for employers of teenagers. The rule announced by the court of appeals places businesses that employ teenagers in the difficult position of attempting to police the voluntary, even if not legally consensual, social conduct of employees outside of the workplace. As one state court recently noted, "expand[ing] employers' liability in this area would have broad ramifications, requiring employers to monitor their employee relationships apart from work." *K.M. v. Publix Super Markets, Inc.*, 895 So.2d 1114, 1119-20 (Fla. Ct. App. 2005). That, in turn, raises serious questions as to how far an employer can or should intrude in order to discover and intervene in the personal lives of its employees.

To place the problem in perspective, it is useful to consider that a substantial majority of American teenagers hold a position of employment at some point before their 18th birthdays. According to a national survey of youth employment conducted by the Bureau of Labor Statistics, approximately 33% of

surveyed youths worked in "employee" jobs (as opposed to "freelance" jobs like babysitting) at age 14. By age 15, that figure rose to over 60%, and by 16, 73.9%.[6] On average during 2005, approximately 2,284,000 16 and 17-year-olds were employed.[7]

The difficulty the decision below poses for the employers of these millions of teenagers is exacerbated by the fact that the Court's holding reaches not only conduct between a minor employee and an adult, but also conduct between teenage employees. For example, it is a crime under Wisconsin law to engage in sexual intercourse with a child over 16 but less than 18 years old. Wisc. Stat. 948.09 (2006). This statute applies even where the accused is also a minor. *See In re Randall M.*, No. 92-0392-FT, 492 N.W.2d 191, 1992 Wisc. App. LEXIS 702 (Wis. Ct. App. Aug. 12, 1992) (unpublished opinion)(reversing dismissal of a delinquency petition against a 15-year-old alleged to have had intercourse with a 17-year-old). Under the decision below, if two 17-year-old employees in Wisconsin had sex outside of work, their employer would be potentially liable to one or both for sexual harassment if it had reason to suspect that the two were in a relationship that might result in sex, regardless of whether the employees' relationship had any other effect on their work. As a result, the decision below invites – indeed, seems to require – an unprecedented level of intrusion into the private affairs of employees, even when there is no evidence of any adverse affect on the conditions of employment of the individuals involved.

The problem is further compounded by the myriad and confusing state laws regulating sexual conduct in relation to

---

[6] "Employment Experience of Youths: Results from a Longitudinal Survey," U.S. Department of Labor, Bureau of Labor Statistics, Dec. 7, 2000, available at ftp://ftp.bls.gov/pub/news.release/History/nlsyth.12072000.news, viewed November 18, 2006.

[7] "Annual Averages – Household Data," "Employment Status of the Civilian Non-Institutional Population by Age, Sex and Race, U.S. Department of Labor, Bureau of Labor Statistics," available at ftp://ftp.bls.gov/pub/special.requests/lf/aat3.txt, viewed November 18, 2006.

minors. For example, some states, Illinois included, apply different standards depending upon the age difference between the parties involved, *see* 720 ILCS 5/12-16(d), while others, like Wisconsin, do not. At least one state, Massachusetts, sets the age of consent at 16, Mass. Ann. Laws ch. 265, § 23 (Matthew Bender 2006), but prohibits enticing a virgin under age 18 to engage in sexual intercourse. *Id.* at ch. 272, § 4.

Even if employers could reasonably be expected to know what conduct may be prohibited by the Seventh Circuit's new rule, they simply are not well-placed to regulate the voluntary conduct of their employees outside of work. The instant case amply illustrates the problem: Doe's mother was aware that Doe was socializing with Nayman, and told her to stop. Doe disregarded her mother's instructions, and continued to socialize with Nayman, eventually sleeping with him. She continued to see Nayman, hiding that fact from both her mother and Oberweis, until another mother informed Doe's mother that Nayman purchased alcohol for a party that Doe attended.

The Seventh Circuit's ruling that Doe need not show that her encounter with Nayman was unwelcome or that she viewed it as hostile or abusive is contrary to established Supreme Court precedent, and is not warranted by the language of the statute, the case law, or policy considerations. Accordingly, this Court should grant Oberweis's petition for *certiorari* as to the second and third questions provided for review.

CONCLUSION

For the foregoing reasons, petitioner Oberweis Dairy, Inc. respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

ANTHONY J. CREMENT
Counsel of Record
EDWARD N. DRUCK
WILLIAM R. POKORNY
FRANCZEK SULLIVAN, P.C.
300 S. Wacker Drive
Suite 3400
Chicago, IL 60606
(312) 986-0300

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JULY 28, 2006

In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 04-3680, 05-1998, 05-3770

JANE DOE,

Plaintiff-Appellant,

and

JANE ROE and JANE ROE 2,

Proposed-Intervenors-Appellants,

v.

OBERWEIS DAIRY,

Defendant-Appellee.

Argued May 30, 2006—Decided July 28, 2006

Before POSNER, KANNE, and WOOD, *Circuit Judges*.

POSNER, *Circuit Judge*. The plaintiff, who is being permitted to litigate her case under a pseudonym, was a high-school student hired as a part-time ice cream "scooper" at the defendant's store in Bartlett, Illinois. She sued under Title VII of the Civil Rights Act of 1964, with supplemental claims for battery, intentional infliction of emotional distress, and related common law wrongs, claiming that a shift supervisor

at the store, Matt Nayman, had harassed her sexually, culminating in sexual intercourse, for which he was prosecuted, convicted, and imprisoned. For Doe was only 16 years old when they had sex, and the age of consent in Illinois is generally 17, 720 ILCS 5/12-16(d), rising to 18 if the accused holds "a position of trust, authority, or supervision in relation to the victim." 720 ILCS 5/12-16(f). We need not decide whether the Illinois courts would think Nayman held such a position in relation to the plaintiff.

The district judge rejected the Title VII claim on the basis of the defendant's motion for summary judgment. He reasoned that the plaintiff had failed to exhaust her administrative remedies and that in any event her claim had no merit because her relationship with Nayman, including their one incident of sexual intercourse, had been voluntary and had occurred outside the workplace and because Nayman's conduct within it had not been, the judge thought, sufficiently offensive to amount to sexual harassment. Having dismissed the plaintiff's federal claim before trial, the district judge then, as is routine, relinquished jurisdiction of the supplemental claims to the state courts.

The plaintiff's main appeal challenges the judgment; in a separate appeal she challenges the district court's award of costs to the defendant. The appeal by the plaintiff's mother and younger sister, the Roe appellants, is from the district judge's denial of their motion to intervene in the litigation. They sought intervention to contest the judge's grant of the defendant's motion for access to the records of the plaintiff's psychiatric therapy sessions, at some of which the mother and the sister were present. The plaintiff also objects. The

records were not turned over; instead, when the plaintiff's objection was rejected, she trimmed her evidence of emotional distress.

The Administrative Procedure Act requires plaintiffs to exhaust their administrative remedies before seeking judicial review of agency action. 5 U.S.C. § 704; *Darby v. Cisneros*, 509 U.S. 137, 143-47, 113 S.Ct. 2539, 125 L.Ed.2d 113 (1993); *Glisson v. U.S. Forest Service*, 55 F.3d 1325, 1326 (7th Cir.1995). Doe's suit does not seek judicial review of the EEOC's handling of her discrimination charge, or of any other agency action, and so the APA is inapplicable. *Riley v. American Family Mutual Ins. Co.*, 881 F.2d 368, 373 (7th Cir.1989); *Flowers v. Laborers Int'l Union*, 431 F.2d 205, 208 (7th Cir.1970); see also *Roach v. Morse*, 440 F.3d 53, 58 (2d Cir.2006); *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 824-25 (9th Cir.2002); *Cleghorn v. Herrington*, 813 F.2d 992, 994-95 (9th Cir.1987). Title VII has its own requirements as to what claimants must do before they can sue, but at least so far as the statutory text is concerned, those requirements are limited to (1) filing a charge with the Equal Employment Opportunity Commission within 180 days after the date of the complained-of employment action, in states that do not have an equal employment opportunity agency, and within 300 days in states like Illinois that do, in which event the complainant must file his complaint with that agency at least 60 days before filing with the EEOC, and (2) waiting to sue until receiving notification (the "right to sue" letter) from the Commission that the Commission does not intend to sue. The Commission must issue the letter within 180 days after receiving the charge. 42 U.S.C. §§ 2000e-5(c), (e), (f)(1); *Martinez v. United Automobile, Aerospace & Agricultural Implement Workers*, 772 F.2d 348, 350 (7th Cir.1985).

The purpose of these requirements is both to give the Commission a chance to investigate the charge and decide whether to sue, and to encourage the complainant and the employer, with or without the state agency's or EEOC's assistance, to resolve their dispute informally. *Horton v. Jackson County Board of County Commissioners*, 343 F.3d 897, 899-900 (7th Cir.2003); *Chacko v. Patuxent Institution*, 429 F.3d 505, 510 (4th Cir.2005); *Foster v. Ruhrpumpen, Inc.*, 365 F.3d 1191, 1195 (10th Cir.2004). Many disputes are resolved at this stage, reducing the burden on the courts of enforcing Title VII; last year the Commission received 55,976 Title VII charges, of which 10,286, or almost 20 percent, were resolved without any litigation (computed from the Commission's website, http://www.eeoc.gov/stats/vii.html, visited June 7, 2006). In addition, the charge filed with the Commission limits the claims that the complainant may raise in litigation.

If the dispute is not settled at the administrative stage, the complaining party has a right to sue (unless the Commission decides to sue, *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 469-70, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982); *Chandler v. Roudebush*, 425 U.S. 840, 844-45, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976); *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 456 (6th Cir.1999)) even if the Commission has investigated and decided that the claim is groundless. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-45, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Solimino v. Astoria Federal Savings & Loan Ass'n*, 901 F.2d 1148, 1151-52 (2d Cir.1990). The Commission's exercise of the

administrative equivalent of prosecutorial discretion does not bar a private suit.

To facilitate its investigation during the 180-day period, the Commission requires the complainant to cooperate, including by participating in a factfinding conference with Commission staff. 29 C.F.R § 1601.15(c). If the complainant fails to cooperate and the failure prevents the Commission from resolving the charge, the Commission can dismiss it. § 1601.18(b). Although neither the regulations nor Title VII makes cooperation a condition of the complainant's being able to sue, the Tenth Circuit has decided that failure to cooperate in good faith is a bar to suit. *Shikles v. Sprint/ United Mgmt. Co.*, 426 F.3d 1304 (10th Cir.2005). (*Shikles* was a suit under the Age Discrimination in Employment Act, but most of the court's discussion is of Title VII.) The Commission has expressed its disagreement with the Tenth Circuit's position in a series of amicus curiae briefs, one filed with us in this case. Because Jane Doe declined to be interviewed by Commission staff, the Commission dismissed her administrative complaint for failure to cooperate. But it still issued her a "right to sue" letter, and the defendant does not dispute that the Commission was required to do so.

Shikles is inconsistent with our decision in *Zugay v. Progressive Care, S.C.*, 180 F.3d 901, 903 (7th Cir.1999). Remember that in states that have an equal employment opportunity agency, the Title VII complainant must file a charge with that agency and cannot proceed further for 60 days. Zugay duly filed, and the agency scheduled a factfinding conference. But before the conference was held, the 60 days expired and Zugay jumped to the next stage (filing with the

EEOC). The defendant argued that Zugay had failed to exhaust her administrative remedies. We disagreed. The only statutory requirement was that the claimant file with the state agency and wait 60 days. The fact that had she been more patient the case might have been resolved on the basis of the factfinding conference that the agency had scheduled did not prevent her from abandoning the process on pain of not being allowed to sue. She did not cooperate, yet could sue anyway.

In *Shikles*, it is true, as in this case, the complainant stopped cooperating during rather than after the statutory period. But the point of *Zugay*, which is equally apposite to this case and *Shikles*, is that the statute does not impose a duty of cooperation, whether during or after the statutory period. The opinion in *Zugay* points out that the complainant had in fact cooperated with the agency for more than 60 days, 180 F.3d at 903, but adds not only that all she was required to do was to "allow . . . the agency 60 days to act," but also that the state could if it wanted waive the 60-day requirement. *Id.* In other words, it could say forget about cooperation. That in effect is what the EEOC has done, and not just in its amicus curiae briefs. *Walker v. United Parcel Service, Inc.*, 240 F.3d 1268, 1274-77 (10th Cir.2001), upheld an EEOC regulation that authorizes the Commission to allow the complainant to sue *before* the end of the 180-day period that the statute gives the Commission to decide whether to sue on its own. If suit can thus be brought before the administrative exhaustion period has expired, that period can hardly be jurisdictional, as the Tenth Circuit in *Shikles* thought.

We acknowledge that without a court-fashioned bar to suits by noncooperators, complainants under Title VII, as

well as complainants under similar employment-discrimination statutes, such as the Age Discrimination in Employment Act and the Americans with Disabilities Act, *Shikles v. Sprint/United Mgmt. Co.*, *supra*; *McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099 (10th Cir.2002), will have less incentive to cooperate with the Commission, and as a result fewer disputes will be resolved at the administrative stage. But if the problem were a significant one, we would expect some evidence of this to have surfaced in the 42 years since Title VII was promulgated, and none has; we would also expect the EEOC to have supported rather than opposed the Tenth Circuit's position.

There is, as we said, no basis in the language of Title VII for that position. The Tenth Circuit acknowledged the Supreme Court's "admonition that no requirements beyond those in the statute should be imposed," *Shikles v. Sprint/United Mgmt. Co.*, *supra*, 426 F.3d at 1315; see *Mohasco Corp. v. Silver*, 447 U.S. 807, 816 n. 19, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980); *McDonnell Douglas Corp. v. Green*, *supra*, 411 U.S. at 798-99, 93 S.Ct. 1817; *Eichman v. Linden & Sons, Inc.*, 752 F.2d 1246, 1249 (7th Cir.1985)—but it imposed them anyway. So the Tenth Circuit's gloss on Title VII is confessedly adventurous, and this will distress originalists. It is also in severe tension with the Supreme Court's recent observation, concerning the "exhaustion" provisions in both Title VII and the Age Discrimination in Employment Act, that "neither of these provisions makes reference to the concept of exhaustion, and neither is in any sense an exhaustion provision." *Woodford v. Ngo*, __ *U.S.* __, __, 126 S.Ct. 2378, 2390, 165 L.Ed.2d 368 (2006). Title VII imposes procedural requirements as a precondition to

bringing a suit in federal court that is an original proceeding rather than one to review agency action. Doe satisfied all those requirements. Title VII does not incorporate anything like the full apparatus of exhaustion, an apparatus designed as we have noted for cases in which judicial review of an adjudication or a rule is sought. We shall continue for convenience to refer to Title VII's "exhaustion" requirements, but they must not be confused with the requirements for APA-type exhaustion.

The decisive objection to the Tenth Circuit's position is that if widely adopted it would protract and complicate Title VII litigation, and with little or no offsetting benefit if we are right in thinking that the problem of complainants who by failing to cooperate with the Commission thwart the conciliation process and as a result thrust additional cases on the federal courts is a slight one. In *Shikles* the complainant's lack of cooperation could be established with unusual ease: he refused to be interviewed, failed to provide the EEOC with the documents that it requested, failed to explain why he could not provide them, and his lawyer failed to respond to several of the EEOC's efforts to reach him. In the next case, however, the complainant might sit for the interview but refuse to answer questions. In the case after that he would answer questions but do so cryptically. And in a subsequent case he would answer questions fully but fail to bargain in good faith over the employer's offer of a settlement.

For the "cooperation" theory of exhaustion requires not merely pro forma compliance with the Commission's regulations but, as *Shikles* put it, a "good faith effort at

cooperation." 426 F.3d at 1317. We know from cases under the National Labor Relations Act, which requires unions and employers to bargain in good faith, 29 U.S.C. § 158(d); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198-99, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991), how difficult it is to enforce such a duty, *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1447 (D.C.Cir.1997) (concurring opinion), because it jostles uneasily with the right (see 29 U.S.C. § 158(d); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 106-08, 90 S.Ct. 821, 25 L.Ed.2d 146 (1970)) of each party to a labor negotiation to refuse an offer by the other even if a neutral observer would think it a fair, even a generous, offer. *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1187 (5th Cir.1982); *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1, 10 (1st Cir.1981); *NLRB v. Milgo Industrial, Inc.*, 567 F.2d 540, 542-43 (2d Cir.1977) (Friendly, J.); see also *PSI Energy, Inc. v. Exxon Coal USA, Inc.*, 17 F.3d 969, 974 (7th Cir.1994). To allow employers to inject such an issue by way of defense in every Title VII case would cast a pall over litigation under that statute.

The fact that in *Shikles* the refusal to cooperate was palpable may have concealed the lurking difficulties in the rule that it adopted. In our case, the veil is pulled back slightly. The plaintiff was only 17 when the charge was filed with the EEOC, and because of her youth it was filed not by her but by her lawyer. The lawyer supplied the Commission's staff with information that enabled the staff to interview ten witnesses to the alleged harassment. When the Commission requested an interview with the plaintiff herself, however, her lawyer turned down the request on the ground that both he and the plaintiff's psychotherapist believed the interview would upset the plaintiff. The lawyer offered to furnish the

Commission with answers to any questions that the staff would have wanted to ask the plaintiff in an interview.

Was this a failure by the plaintiff to "cooperate"? In a literal sense, yes, as the Commission ruled in dismissing the administrative complaint on that basis. Evidently the Commission didn't think that without interviewing the plaintiff it could determine whether to bring suit against the employer on her behalf. It brings very few cases and so wants to be very sure of the merits before proceeding. But was she acting in bad faith in failing to cooperate to the extent sought by the Commission? For all we know, even the Tenth Circuit would say no; for she had a reason not to cooperate. Nor is there any indication that by failing to sit for an interview she made it more difficult to resolve her dispute with the defendant before bringing suit. The defendant would not have had access to a transcript of the interview unless and until she sued.

Failure to exhaust administrative remedies can often be excused. E.g., *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 13, 120 S.Ct. 1084, 146 L.Ed.2d 1 (2000); *McCarthy v. Madigan*, 503 U.S. 140, 146-49, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992); *Ruttenberg v. United States Life Ins. Co.*, 413 F.3d 652, 662 (7th Cir.2005); *Woodall v. Federal Bureau of Prisons*, 432 F.3d 235, 239 n. 2 (3d Cir.2005); *United States v. Calderon*, 391 F.3d 370, 375 (2d Cir.2004). And especially when creating an exhaustion requirement, a court can build in exceptions. *Watts v. BellSouth Telecommunications, Inc.*, 316 F.3d 1203, 1206-07 (11th Cir.2003). "To the extent that [exhaustion of administrative remedies] is a doctrine of federal common law rather than

the inflexible command of a statute, it is to be applied with due regard for its underlying purpose and for considerations that may in particular cases counsel for a waiver." *Glisson v. United States Forest Service*, *supra*, 55 F.3d at 1327; see also *Paese v. Hartford Life Accident Ins. Co.*, 449 F.3d 435, 445-46 (2d Cir.2006). "Only when Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision . . . has the Supreme Court held that exhaustion is a jurisdictional prerequisite." *I.A.M. National Pension Fund Benefit Plan C v. Stockton Tri Industries*, 727 F.2d 1204, 1208 (D.C.Cir.1984).

We are quite aware that exhaustion of administrative remedies is required when the Title VII plaintiff is a federal employee. E.g., *Hill v. Potter*, 352 F.3d 1142, 1145-46 (7th Cir.2003); *Greenlaw v. Garrett*, 59 F.3d 994, 996-98 (9th Cir.1995); *Khader v. Aspin*, 1 F.3d 968, 971 (10th Cir.1993). But the statutory framework is different. In private-sector cases the EEOC must bring a lawsuit if it wants to obtain relief for a victim of discrimination. But in federal-employee cases it can provide that relief through its own administrative process. 42 U.S.C. § 2000e-16(b). That is a situation in which exhaustion is invariably required, e.g., *Reiter v. Cooper*, 507 U.S. 258, 269, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993); *McCarthy v. Madigan*, 503 U.S. 140, 144-48, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 551 (10th Cir.2001)—indeed by the Administrative Procedure Act, as we saw earlier. For otherwise the claimant would have an arbitrary choice of forums, and the courts would be burdened with litigation that could have been conducted, perhaps more expeditiously

and expertly, before the administrative body. That is not a course open to the private-sector Title VII claimant, because the EEOC cannot enforce the statute administratively on behalf of such a claimant, cf. *Sayaxing v. INS*, 179 F.3d 515, 522-23 (7th Cir.1999), but only by filing a suit.

In addition, federal employees must file their discrimination complaints directly with the agency that employs them, rather than with the EEOC, 42 U.S.C. § 2000e-16(c); *Brown v. GSA*, 425 U.S. 820, 828-35, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976), so that judicial interference with the operation of the federal government will be minimized. *Jasch v. Potter*, 302 F.3d 1092, 1096 (9th Cir.2002); *McRae v. Librarian of Congress*, 843 F.2d 1494, 1496 (D.C.Cir.1988) (per curiam); cf. *Robinson v. Dalton*, 107 F.3d 1018, 1020-21 (3d Cir.1997). That aim would be blunted if the employee could bypass the employer by not cooperating with him.

We conclude at long last that Jane Doe "exhausted" her administrative remedies, and so we come to the merits of her appeal. Construing the evidence as favorably to her as the record permits, as we must, we assume that Nayman, the shift supervisor, regularly hit on the girls (most of the employees were teenage girls) and young women employed in the ice cream parlor. He would, as one witness explained, "grope," "kiss," "grab butts," "hug," and give "tittie twisters" to these employees, including the plaintiff. These things he did in the store, but he would also invite the girls to his apartment. He had sexual intercourse in the apartment with two of them, one of them a minor, before it was the plaintiff's turn. He was 25 when he had intercourse with her.

Appendix A

The district judge ruled that the plaintiff was not harassed, because she welcomed Nayman's advances. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). In so ruling, however, the judge stepped out of the proper role of a judge asked to decide a motion for summary judgment and made findings on contested factual issues relating to the plaintiff's dealings with Nayman, as when the judge said that "once, Nayman gave Plaintiff a hug and kiss in an effort to make Plaintiff happy," or that "Nayman also 'playfully' hit Plaintiff on the behind with a rag on one occasion."

What is uncontested is that Nayman did not commit forcible rape. But he committed statutory rape, that is, intercourse with an underage person, which is made a crime because of a belief that below a certain age a person cannot (more realistically, is unlikely to be able to) make a responsible decision about whether to have sex. *Valencia v. Gonzales*, 439 F.3d 1046, 1053 (9th Cir.2006); Michelle Oberman, "*Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*," 48 Buff. L.Rev. 703, 710 (2000). In Illinois as elsewhere the crime is considered more serious the greater the disparity in ages between the parties. The theory is that a young girl (or boy) is likely to have particular difficulty resisting the blandishments of a much older man. 720 ILCS 5/12-15(c), 16(d). Nayman was nine years older than Jane Doe when they had sex.

"The age of consent fixed by a state represents a legislative judgment about the maturity of girls in matters of sex." *Beul v. ASSE Int'l, Inc.*, 233 F.3d 441, 450 (7th Cir.2000). To avoid undermining valid state policy by

reclassifying sex that the state deems nonconsensual as consensual, to simplify employment-discrimination litigation, and to avoid intractable inquiries into maturity that legislatures invariably pretermit by basing entitlements to public benefits (right to vote, right to drive, right to drink, right to own a gun, etc.) on specified ages rather than on a standard of "maturity," federal courts, rather than deciding whether a particular Title VII minor plaintiff was capable of "welcoming" the sexual advances of an older man, should defer to the judgment of average maturity in sexual matters that is reflected in the age of consent in the state in which the plaintiff is employed. That age of consent should thus be the rule of decision in Title VII cases. This conclusion is consistent with cases in related contexts, *Mary M. v. North Lawrence Community School Corp.*, 131 F.3d 1220, 1226 (7th Cir.1997); *Doe by Doe v. Greenville Hospital System*, 323 S.C. 33, 448 S.E.2d 564, 566 (1994); with the provision of the *Restatement of Torts* that "if conduct is made criminal in order to protect a certain class of persons irrespective of their consent, the consent of members of that class to the conduct is not effective to bar a tort action," Restatement (Second) of Torts § 892C (1979); and with the common practice of using state law to fill gaps in federal law. E.g., *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 108-09, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-28, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979).

We realize that as a consequence of our approach the protection that Title VII gives teenage employees will not be uniform throughout the country, since the age of consent is different in different states, though within a fairly narrow

band. Uniformity would require federal courts either to specify an age at which American teenagers shall be deemed capable of consenting to sexual advances in the workplace or to determine the individual plaintiff's maturity in each case. Neither of these alternatives is satisfactory; both in their different ways are arbitrary. Deferring to each state's determination of the age of consent not only makes the litigation of cases such as this much simpler and no more arbitrary; it also reflects the differences among the states in judgments about the maturity of teenagers in sexual matters.

For completeness we add that although consent to sexual relations with a coworker or supervisor is not a defense in a Title VII suit for sexual harassment brought by a plaintiff who was underage when the conduct alleged to constitute harassment occurred, this does not mean that the conduct of the plaintiff can never be used to reduce the defendant's damages in such a case. In a negligence case brought by an exchange student against the company that had placed her with a couple and the husband raped her, we said that "it would have been error to instruct the jury that because Kristin was below the age of consent her comparative fault must be reckoned at zero. That would have given too much force to the criminal statute in this civil case, for the statute cannot be considered a legislative judgment that minors are utterly incapable of avoiding becoming ensnared in sexual relationships." *Beul v. ASSE Int'l, Inc.*, *supra*, 233 F.3d at 450-51; see also *LK v. Reed*, 631 So.2d 604, 607-08 (La.App.1994); *Morris v. Yogi Bear's Jellystone Park Camp Resort*, 539 So.2d 70, 76-78 (La.App.1989); *Robinson v. Roberts*, 205 Ga.App. 645, 423 S.E.2d 17, 18 (1992); contra, *Hutchison v. Luddy*, 763 A.2d 826, 848-49 (Pa.Super.2000),

vacated on other grounds, 582 Pa. 114, 870 A.2d 766 (2005). *Beul* was a common law negligence case, however; this is a Title VII case and we cannot find a case under Title VII in which comparative fault was recognized as a complete or partial defense to liability.

Title VII does require mitigation of damages with respect to back pay, because it provides that "interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. § 2000e-5(g)(1); see *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982); *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1580-81 (7th Cir.1997). But failure to mitigate is distinct from comparative fault. The duty to mitigate arises after the plaintiff has been injured, the duty of care before. *Robinson v. Southeastern Pennsylvania Transportation Authority*, 982 F.2d 892, 898-99 (3d Cir.1993), rejected a defense of comparative fault in the context of back pay-understandably, as comparative fault is a common law defense and back pay is an equitable remedy, even after the amendment to Title VII that added a damages remedy to the statute. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 500 (7th Cir.2000); *Lutz v. Glendale Union High School, District No. 205*, 403 F.3d 1061, 1067-69 (9th Cir.2005).

In adding that remedy Congress did not indicate whether or what defenses based on victim fault might be available to a defendant; and there is no pertinent legislative history. Congress may have felt that to recognize such a defense in a discrimination case would be "blaming the victim" with a

vengeance, for it would amount to saying that a person might be to blame for being discriminated against on the basis of his race or sex or some other forbidden criterion. Of course such a victim may have contributed to the adverse employment action of which he complains; he may have been an incompetent employee whom his employer would have fired wholly apart from the employee's membership in a protected group, and if so he could not get damages. But it would be odd and even distasteful to blame him for the invidious discrimination itself.

This case, however, is unusual because the plaintiff was an active participant in, rather than a passive victim of, the principal discriminatory act of which she complains-the act of sexual intercourse with Nayman. At the damages stage of this proceeding, should it get that far, the defendant-who is not Nayman, but Nayman's employer-should be permitted to put Nayman's conduct in perspective. If Doe was sneaking around behind her mother's-and her employer's-back and thus facilitating Nayman's behavior, the employer may be able to show that the harm she suffered that was caused by its violation of Title VII (if such a violation is found on remand), rather than by Nayman, was minimal.

That would be a straightforward application of the principle that a plaintiff may recover from a defendant only those compensatory damages that can fairly be traced to the defendant's conduct. "The normal measure of tort damages is the amount which compensates the plaintiff for all of the damages proximately caused by the defendant's negligence," *Haymon v. Wilkerson*, 535 A.2d 880, 885 (D.C.1987); see also Restatement (Second) of Torts § 917, comment c

(1979) ("the rules that determine the causal relation necessary to liability are as fully applicable to establish the extent of liability as to establish its existence")—that is, caused by the defendant's failure to exercise the degree of care that the law requires. What that degree of care is in a case such as the present one is taken up later in this opinion. Though inquiries into the maturity of individual minors are, as we said earlier, bound to be fraught with uncertainty, a jury should be able to sort out the difference between an employer's causal contribution to the statutory rape by its employee of a 16-year-old siren (if that turns out to be an accurate description of Doe) and to similar conduct toward, say, a 12-year-old.

But in discussing an issue for the damages phase of a remanded proceeding we have gotten ahead of ourselves, as we have not yet resolved crucial issues of liability. That Doe cannot be taken to have consented to Nayman's advances does not establish *workplace* sexual harassment. Title VII is limited to employment discrimination, and therefore sexual harassment is actionable under the statute only when it affects the plaintiff's conditions of employment. *Burlington Northern & Santa Fe Ry. v. White*, __ U.S. __, __, 126 S.Ct. 2405, 2411-12, 165 L.Ed.2d 345 (2006); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66-67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986); *McPherson v. City of Waukegan*, 379 F.3d 430, 437-38 (7th Cir.2004).

The sexual act need not be committed in the workplace, however, to have consequences there. In *Meritor*, the "respondent testified that during her probationary period as a teller-trainee, Taylor treated her in a fatherly way and made

no sexual advances. Shortly thereafter, however, he invited her out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations. At first she refused, but out of what she described as fear of losing her job she eventually agreed." 477 U.S. at 60, 106 S.Ct. 2399; see *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409-10 (1st Cir.2002). But at the very least the harassment must, as in *Meritor*, be an episode in a relationship that began and grew in the workplace. Cf. *Whitaker v. Carney*, 778 F.2d 216, 221 (5th Cir.1985). Had Nayman met Doe on the last day of either his or her employment at the ice cream parlor and later asked her for a date that eventually culminated in sexual intercourse, the connection to the workplace would have been too attenuated to constitute workplace harassment. Cf. *Hunter v. Countryside Association for the Handicapped, Inc.*, 723 F.Supp. 1277, 1278 (N.D.Ill.1989). It would have been no different from his asking a customer for a date.

But that is not what happened. The relationship began with flirtatious talk and erotic touching in the workplace and continued there for nine months before Nayman and Doe had sex. Nor did it end with their sexual encounter. She continued working at the ice cream parlor in close proximity with her harasser-indeed under his supervision-after the statutory rape, though for less than two weeks. See *Fuller v. City of Oakland*, 47 F.3d 1522, 1527-28 (9th Cir.1995). Because her consent to have sex with Nayman was, as a matter of law, ineffectual, this is a case of a worker subjected to nonconsensual sex by a supervisor or at least quasi-supervisor (see below) during, as well as arising from, the employment relation. That is a sufficiently strong case of workplace sexual harassment to withstand summary

judgment. Whether it is harassment *by the employer* is a separate question.

We shall turn to that question momentarily but first we want to make clear that we are not holding that Nayman's behavior with Doe and the other underage girls *before* that behavior culminated in sexual intercourse was sexual harassment per se. That was not criminal conduct. Nor are American teenage girls such blushing violets that sexual badinage is harassment per se. The criminal laws of the states recognize the distinction between talk and casual physical contact on the one hand and sexual intercourse on the other; and so should federal courts in Title VII cases. The plaintiff presented evidence that she was disturbed by the defendant's attentions in the workplace but did not feel free to resist them for fear of losing her job (and it was her first job), but that evidence was contested and so its significance remains to be determined.

But was the defendant *responsible* for Nayman's conduct? The general rule, crudely stated however (as we are about to see), is that if the harasser is a supervisor, the employer is strictly liable for the harassment, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 760-65, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Hall v. Bodine Electric Co.*, 276 F.3d 345, 355 (7th Cir.2002), while if he is a coworker the employer is liable only if it failed to have and enforce a reasonable policy for preventing harassment, or in short only if it was negligent in failing to protect the plaintiff from predatory coworkers. *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 951-52 (7th Cir.2005); *Loughman v. Malnati Organization, Inc.*, 395 F.3d 404, 407 (7th Cir.2005).

Appendix A

The paradigmatic supervisor is an employee who has the authority to fire the plaintiff, e.g., *Savino v. C.P. Hall Co.*, 199 F.3d 925, 932 n. 7 (7th Cir.1999), because by giving him that authority the employer has armed him to intimidate the employees whom he supervises. *Gawley v. Indiana University*, 276 F.3d 301, 311 (7th Cir.2001); *Lutkewitte v. Gonzales*, 436 F.3d 248, 259-60 (D.C.Cir.2006) (concurring opinion). The paradigmatic coworker is a worker of the same status as the plaintiff. The difficulty of classification in this case arises from the fact that Nayman, the shift supervisor, was in between the paradigmatic classes. He had supervisory responsibility in the sense of authority to direct the work of the scoopers, and he was even authorized to issue disciplinary write-ups, but he had no authority to fire them. He was either an elevated coworker or a diminished supervisor. The defendant's brief denies that shift supervisors have any disciplinary authority, but this is one of many factual errors in the brief.

If forced to choose between the two pigeonholes, we would be inclined to call Nayman a supervisor, consistent with *Gawley v. Indiana University*, *supra*, 276 F.3d at 311—though *Hall v. Bodine Electric Co.*, *supra*, 276 F.3d at 355, tugs the other way—because he was often the only supervisory employee present in the ice cream parlor. He was thus in charge, and had he told his boss that one of the scooper girls was not doing a good job and should be fired, the boss would probably have taken his word for it rather than conduct an investigation, since Doe—a part-time teenage worker—would hardly have been considered a valued employee.

But there is no compelling need to make a dichotomous choice. Simplicity is a value in law, as we have stressed, but it is not the only value. Binary distinctions are not the only ones that judges and juries are capable of making. *Burlington Industries, Inc. v. Ellerth*, *supra*, 524 U.S. at 760-62, 118 S.Ct. 2257, along with its companion case, *Faragher v. City of Boca Raton*, 524 U.S. 775, 802-03, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), recognizes this in two ways. They distinguish between supervisors who take or threaten to take a "tangible employment action" against a subordinate, such as firing her or denying her a promotion, and supervisors who are merely "aided in accomplishing the tort [i.e., the harassment] by the existence of the agency relation," that is, the supervisor's status as the employer's agent. *Id.* at 801, 807, 118 S.Ct. 2275; *Pennsylvania State Police v. Suders*, 542 U.S. 129, 143-46, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004); *Burlington Industries, Inc. v. Ellerth*, *supra*, 524 U.S. at 760-62, 118 S.Ct. 2257. And in adopting the negligence standard to govern the employer's liability for coworker harassment, which requires determining whether "the company was negligent either in discovering or remedying the harassment." *Hall v. Bodine Electric Co.*, *supra*, 276 F.3d at 356, the cases implicitly impose on the employer a higher duty of care to protect its employees against those employees whom the employer has armed with authority, even if it is less than the authority that triggers the employer's strict liability.

Under either approach, even if not strictly liable for harassment by a shift supervisor, still the employer must exercise greater care than is required in a case of routine harassment by a coworker. How much greater will normally

be a jury question, though of course in extreme questions it will be answered by the judge. The defendant was not entitled to summary judgment on the question in this case. The fact that Nayman was often the only supervisor in the ice cream parlor and that the workers he was supervising were for the most part inexperienced teenagers working part time created a risk of harassment by him that required his employer to take greater care than if Nayman had been one of the teenage scoopers. Other shift supervisors were aware of Nayman's sexually suggestive behavior with the teenage scoopers (also that he was an alcoholic) and his practice of inviting them to his apartment. But either they did not report this conduct to their managers as they should have done or the managers took no action because they believed that activity that occurs outside the workplace is none of their business even if it originated in the workplace and had consequences there. No procedures were in force or utilized for protecting girls like the plaintiff from what happened to her, even though it should have been clear that the situation in the store as a result of Nayman's antics was explosive.

An employer of teenagers is not *in loco parentis*, but he acts at his peril if he fails to warn their parents when he knows or should know that their children are at substantial risk of statutory rape by an older, male shift supervisor in circumstances constituting workplace harassment. "[S]exual harassment may be a particular problem in the restaurant industry because restaurants often hire young, inexperienced workers. High employee turnover contributes to the problem, presumably because of monitoring difficulties and the need to train new employees continually. . . . [R]estaurants often try to create an 'entertainment atmosphere' that can cloud

the rules for appropriate conduct in the workplace." Jennifer Ann Drobac, "*Sex and the Workplace: 'Consenting' Adolescents and a Conflict of Laws*," 79 Wash. L.Rev. 471, 481 (2004).

In sum, the district judge terminated the case prematurely. But he was correct to allow the defendant access to the plaintiff's psychiatric records. Although there is a psychotherapist-patient privilege in federal cases, *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996), intended like the closely related doctor-patient privilege to avoid deterring people from seeking treatment by fear that by doing so they will incur a disadvantage in litigation, the privilege is not absolute. If a plaintiff by seeking damages for emotional distress places his or her psychological state in issue, the defendant is entitled to discover any records of that state. *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir.2000); see generally Beth S. Frank, Note, "*Protecting the Privacy of Sexual Harassment Plaintiffs: The Psychotherapist-Patient Privilege and Recovery of Emotional Distress Damages under the Civil Rights Act of 1991*," 79 Wash. U.L.Q. 639, 651-57 (2001). Rule 35 of the Federal Rules of Civil Procedure would entitle the defendant to demand that the plaintiff submit to a psychiatric examination, e.g., *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist.*, 60 F.3d 305, 309-10 (7th Cir.1995); see *Havinga v. Crowley Towing & Transp. Co.*, 24 F.3d 1480, 1488 (1st Cir.1994), the results of which would be available for use by the defendant in discovery and at trial; there is no greater invasion of privacy by making existing records available to the defendant. The judge can seal the plaintiff's psychiatric records and limit their use in

the trial (which is public) to the extent that the plaintiff's interest in privacy outweighs the probative value of the information contained in the records. *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923, 927 (7th Cir.2004); *In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1216-17 (D.C.Cir.2004).

As for the cross-appeal, however, the Roes have a legitimate interest in excluding from the litigation such portions of the records as may refer exclusively to them, for their mental condition is not germane to the plaintiff's lawsuit. They were entitled to intervene to protect that interest, a substantial privacy interest. Fed.R.Civ.P. 24(a)(2); *United States v. Kemper Money Market Fund, Inc.*, 704 F.2d 389, 392 (7th Cir.1983); *Eng v. Coughlin*, 865 F.2d 521, 526-27 (2d Cir.1989).

To summarize, the judgment for the defendant is reversed (together with the denial of the Roes' motion to intervene) and the award of costs vacated; the case is remanded for further proceedings consistent with this opinion; and the supplemental claims shall be reinstated.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED APRIL 6, 2005

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 03 C 4774

Judge John W. Darrah

JANE DOE,

Plaintiff,

v.

OBERWEIS DAIRY,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff, Jane Doe, filed suit against Defendant, Oberweis Dairy. Plaintiff alleges that she was subjected to a sexual battery outside of the workplace by Defendant's employee while she was a minor and employed by Defendant. Plaintiff brings one federal claim alleging sexual discrimination and harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and three state law claims alleging: (1) negligent hiring, training, and supervision; (2) willful and wanton misconduct; and (3) assault and battery. Presently before the Court are cross-

motions for summary judgment; Defendant seeks summary judgment on all claims, and Plaintiff seeks summary judgment on her Title VII claim.

LEGAL STANDARD

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 150 (7th Cir.1994). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (*Celotex*). Thus, although the moving party on a motion for summary judgment is responsible for demonstrating to the court why there is no genuine issue of material fact, the non-moving party must go beyond the face of the pleadings, affidavits, depositions, answers to interrogatories, and admissions on file to demonstrate, through specific evidence, that a genuine issue of material fact exists and to show that a rational jury could return a verdict in the non-moving party's favor. *Celotex*, 477 U.S. at 322-27; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-56, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (*Anderson*); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (*Matsushita*); *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 923 (7th Cir.1994).

Disputed facts are material when they might affect the outcome of the suit. *First Ind. Bank v. Baker*, 957 F.2d 506,

507-08 (7th Cir.1992). When reviewing a motion for summary judgment, a court must view all inferences to be drawn from the facts in the light most favorable to the opposing party. *Anderson*, 477 U.S. at 247-48; *Popovits v. Circuit City Stores, Inc.*, 185 F.3d 726, 731 (7th Cir.1999). However, a metaphysical doubt will not suffice. *Matsushita*, 475 U.S. at 586. If the evidence is merely colorable or is not significantly probative or is no more than a scintilla, summary judgment may be granted. *Anderson*, 477 U.S. at 249-250.

BACKGROUND

The undisputed facts, for the purposes of this motion, taken from the parties' Local Rule 56.1(a) & (b) statements of material facts (referred to herein as "Pl.'s 56.1" and "Def.'s 56.1") and exhibits, are as follows.

Plaintiff was sixteen years old and was employed at one of Defendant's retail stores. Def.'s 56.1 ¶¶ 52, 53, 57. Plaintiff worked with Matt Nayman, who, at that time, was twenty-four years old. Def.'s 56.1 ¶¶ 12, 31, 57.

Plaintiff worked with Nayman between December 2001 and August 2002. *See* Def.'s 56.1 ¶¶ 57, 130. Beginning early in Plaintiff's employment with Defendant, Nayman squeezed Plaintiff's arm above the elbow five or six times and asked Plaintiff how she was doing. Def.'s Ex. A, Pl.'s Dep. at 101-103. Plaintiff responded by telling Nayman whether she felt happy or sad. Def.'s Ex. A, Pl.'s Dep. at 103. Nayman, also beginning early in Plaintiff's employment, put his arm around Plaintiff five or six times in a "side hug" or a "side squeeze." Def.'s Ex. A, Pl.'s Dep. at 102-104. Plaintiff did not believe this hug was sexual. Def.'s Ex. A, Pl.'s Dep. at 104.

Appendix B

On another occasion, Nayman gave Plaintiff a "happy-to-see-you type of hug" when she came to work. Def.'s Ex. A, Pl.'s Dep. at 108-109. In March 2002, Nayman also once gave Plaintiff a hug and a kiss on the cheek. Def.'s Ex. A, Pl.'s Dep. at 97. Nayman thought Plaintiff looked sad, and he was trying to make Plaintiff happy. Def .'s Ex. A, Pl.'s Dep. at 99. In June 2002, Nayman "playfully" hit Plaintiff on her behind with a rag. Def.'s Ex. A, Pl.'s Dep. at 96.

Further, in February or March 2002, Nayman told Plaintiff that she was pretty and that he did not understand why Plaintiff did not have a boyfriend. Def.'s Ex. A, Pl.'s Dep. at 100. Nayman would also tell Plaintiff that if she was not so young, he would want to date Plaintiff. Def.'s Ex. A, Pl.'s Dep. at 100. Plaintiff found these comments "flattering." Def.'s Ex. A, Pl.'s Dep. at 100. On three or four other occasions in June and August 2002, Nayman told Plaintiff that she was cute. Def.'s Ex. A, Pl.'s Dep. at 107.

Beginning in May 2002, Plaintiff visited Nayman's apartment on a number of occasions with friends. Def.'s 56.1 ¶¶ 62-69. Sometimes when Plaintiff left Nayman's apartment, he would give her a goodbye hug. Def.'s 56.1 ¶ 69. In June or July of 2002, Plaintiff's mother discovered that Plaintiff was visiting Nayman at his apartment. Def.'s 56.1 ¶ 73. Plaintiff's mother told Plaintiff not to go to Nayman's apartment anymore, but Plaintiff continued to visit Nayman. Def.'s Ex. A, Pl.'s Dep. at 69. Plaintiff used her car to provide transportation for Nayman to visit a relative who lived forty-five minutes away in the suburbs. Def.'s 56.1 ¶¶ 77-78.

Appendix B

On a day Plaintiff did not work in August 2002, Plaintiff, Nayman, and another friend were at Nayman's apartment. Def.'s 56.1 ¶¶ 79-80. After eating dinner with her parents, Plaintiff returned to Nayman's house and gave the friend a ride home. Def.'s 56.1 ¶¶ 81-82. Plaintiff intended to return to Nayman's apartment with a few other friends but eventually decided to return alone because she had nothing else to do. Def.'s 56.1 ¶¶ 83, 86-89. Plaintiff intended to "hang out," as she normally would, at Nayman's apartment. Def.'s 56.1 ¶ 90. While they were alone at the apartment, Plaintiff and Nayman engaged in a sexual encounter. Def.'s 56.1 ¶¶ 91-105. During the course of this sexual encounter, Plaintiff asked Nayman to get a condom, which Nayman did. Def.'s 56.1 ¶¶ 101-104. Because Plaintiff was under the age of consent, Nayman eventually pled guilty to aggravated criminal sexual abuse. Pl.'s 56.1 ¶¶ 1-3.

After the sexual encounter, Plaintiff asked Nayman to purchase alcohol for her friend's party. Def.'s 56.1 ¶ 112. Plaintiff also asked Nayman to attend the party. Def.'s 56.1 ¶ 113. Plaintiff picked up Nayman at his apartment, went to a store to purchase alcohol, and then went to the party. Def.'s 56.1 ¶¶ 114-116. Plaintiff, Nayman, and several others spent the night at the house where the party was occurring. Def.'s 56.1 ¶ 120. The next morning, Plaintiff drove Nayman home. Def.'s 56.1 ¶ 121. Later that day, Plaintiff called Nayman to ensure that he was okay. Def.'s 56.1 ¶ 122.

Thereafter, Plaintiff's agent, on her behalf, filed a charge with the Equal Employment Opportunity Commission ("EEOC") against Defendant. Pl's Resp to Def's 56.1 ¶ 152. Plaintiff asked the EEOC not to reveal her identity to anyone

other than Defendant, so that Defendant could respond to the charge. Pl.'s Ex. 64 at A00111, A00134. During the course of the investigation, the EEOC interviewed a number of witnesses concerning Plaintiff's charge and asked questions regarding: (1) background information, such as the name and age of the witness; (2) the witness's employment history with Defendant; (3) the work environment; (4) any behavior the witness observed that could be considered sexual harassment; (5) Defendant's policies regarding sexual harassment; (6) the witness's knowledge of sexual harassment complaints; (7) Nayman and his interactions and conduct with Plaintiff and other employees; and (8) any inappropriate behavior that involved or was directed towards Plaintiff. Pl.'s Ex. 64 at A00081-100, A00112-133.

However, Plaintiff refused to be interviewed by the EEOC. Def.'s 56.1 ¶ 154. On February 11, 2003, the EEOC investigator sent Plaintiff's agent/attorney a letter detailing the investigator's attempt to schedule an interview with Plaintiff and requesting the agent/attorney to do so. Def.'s Ex. X. On March 25, 2003, the EEOC investigator sent Plaintiff's agent/attorney a letter stating that he had persistently attempted to schedule an interview with Plaintiff for the past three months. Def.'s Ex. X. That same letter also provided notice to Plaintiff that her failure to cooperate within thirty-three days would result in a dismissal. Def.'s Ex. X. Five weeks later, on April 30, 2003, the EEOC dismissed Plaintiff's charge for her failure to cooperate and issued a right-to-sue letter. Def.'s 56.1 ¶ 155, Def.'s Ex. Y.

Appendix B

ANALYSIS

A plaintiff must exhaust her administrative remedies with the EEOC before filing a charge in federal court under Title VII. *See Hill v. Potter*, 352 F.3d 1142 (7th Cir.2003) (*Hill*); *Gibson v. West*, 201 F.3d 990 (7th Cir.2000) (Gibson). A plaintiff is required to cooperate with the EEOC in order to meet the exhaustion requirement. *Hill v. Potter*, 352 F.3d at 1146; *Morris v. Albertson, Inc.*, No. 01 C 2099, 2001 WL 936118, at *2 (N.D.Ill. Aug.17, 2001) (*Morris*); *Duncan v. Consol. Freightways Corp.*, No. 94 C 2507, 1995 WL 530652, at *3 (N.D.Ill. Sept.7, 1995) (*Duncan*).

Here, it is undisputed that the EEOC attempted to schedule an interview with Plaintiff, but Plaintiff failed to cooperate. It is also undisputed that the EEOC provided notice to Plaintiff that her charge may be dismissed if she failed to cooperate within the next thirty days. It is further undisputed that the EEOC dismissed the charge because it could not be resolved without Plaintiff's cooperation.

However, "the failure to exhaust administrative remedies is a precondition to bringing a Title VII claim in federal court, rather than a jurisdictional requirement." *Gibson*, 201 F.3d at 994. Therefore, a plaintiff can present equitable reasons for her failure to comply with the exhaustion requirements. *See Gibson*, 201 F.3d at 994.

Plaintiff contends that her failure to cooperate should not bar her Title VII claim because: (1) the cases cited by Defendant regarding the exhaustion requirement involved only federal employees, which have different EEO

procedures; (2) the EEOC failed to keep Plaintiff's identity confidential and disclosed intimate, personal details of Plaintiff; (3) Plaintiff fully cooperated with the EEOC by making her available to discuss the matter through her agent and attorney, thereby allowing the EEOC to conduct an in-depth investigation; and (4) Plaintiff received the right-to-sue letter, demonstrating Plaintiff cooperated with the EEOC under 29 C.F.R. 1601.28(b)(3).

(1) Contrary to Plaintiff's assertion, cases cited by Defendant do not involve federal employers. The plaintiff in *Morris* worked at a supermarket, while the plaintiff in *Duncan* worked at an interstate freight shipper. *Morris*, 2001 WL 936118, at *1; *accord Duncan*, 1995 WL 530652, at *1.

(2) Plaintiff argues that she refused to be interviewed because the EEOC failed to keep her identity confidential and disclosed intimate details of the case to many of Defendant's employees, including some of Plaintiff's high school classmates. However, it is undisputed that Plaintiff permitted the EEOC to reveal her identity to Defendant so that Defendant could respond to the charge. It is reasonable, therefore, that witnesses, such as Defendant's employees, would also be interviewed regarding Plaintiff's charge. These persons could not be properly questioned without disclosing Plaintiff's identity.

The EEOC asked witnesses questions about Plaintiff, Nayman, the employment environment, and any acts of inappropriate conduct and sexual harassment involving Plaintiff or any other employee. While the questions may have elicited answers containing intimate information, those questions by the EEOC do not disclose intimate information.

(3) Plaintiff next contends that she fully cooperated with the EEOC through her agent/attorney, which allowed the EEOC to interview more than ten witnesses and conduct an in-depth investigation. In support of this proposition, Plaintiff cites *Jasch v. Potter*, 302 F.3d 1092, 1095 (9th Cir.2002) (*Jasch*). However, that case provides:

> This case, however, does not fall within our rule or violate Title VII's exhaustion goal because [plaintiff's] participation in the investigation proved sufficient to permit the agency to examine his discrimination claim. . . . While the agency had the right to dismiss [plaintiff's] claim for failure to cooperate, it chose not to. Faced with the situation in which the complainant fails to respond to agency requests for additional information the agency is confronted with a choice. "The agency shall: dismiss an entire complaint . . . [w]here the agency has provided the complainant with a written request to provide relevant information . . . and the complainant has failed to respond to the request within 15 days of its receipt . . . , provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information is available." 29 C.F.R. § 1614.107(a)(7). **When an agency proceeds to reach the merits of the case rather than dismiss the claim for failure to cooperate, it has determined that sufficient information exists for such adjudication. After all, the agency itself is in a strong position to**

> **evaluate whether the complainant has sufficiently complied with its own requests for information. Of course, the complainant who fails to respond to agency requests for information does so at his own peril.**

Jasch, 302 F.3d at 1095 (alterations in original) (emphasis added). Although *Jasch* involved the regulation concerning dismissals for Title VII claims arising out of federal employment, the same reasoning applies in this matter.

The regulation concerning dismissals for Title VII claims arising out of private employment allows the EEOC to decide whether to dismiss an action for a failure to cooperate, as it chose to here:

> **Where the person claiming to be aggrieved** fails to provide requested necessary information, **fails or refuses to appear or to be available for interviews or conferences as necessary**, fails or refuses to provide information requested by the Commission pursuant to § 1601.15(b), or otherwise refuses to cooperate to the extent the Commission is unable to resolve the charge, and after due notice, the charging party has had 30 days in which to respond, **the Commission may dismiss the charge**.

29 C.F.R. § 1601.18 (emphasis added). Plaintiff has also failed to provide any authority for the proposition that the availability of an agent to answer questions regarding alleged harassment satisfies the cooperation requirement.

(4) Lastly, Plaintiff argues that the EEOC provided her with a right-to-sue letter under 29 C.F.R. § 1601.29(b)(3). That provision, however, states that the EEOC shall issue a right-to-sue letter even when a complaint is dismissed. The issuance of a right-to-sue letter does not guarantee a Title VII claim may be brought in federal court. The "EEOC's *pro forma* issuance of a right-to-sue letter when it terminates its processing because of such a failure to cooperate [does not] constitute[ ] a ticket of entry to the federal court." *Morris*, 2001 WL 936118, at *2; *accord Duncan*, 1995 WL 530652, at *3; *Prior v. U.S. Cellular Corp.*, 46 F.Supp.2d 808, 811 (N.D.Ill.1999) ("[T]he mere receipt of a right to sue [sic] letter does not necessarily mean that a plaintiff has exhausted her administrative remedies. . . .").

Based on the above, no genuine issue of material fact exists as to whether Plaintiff failed to exhaust her administrative remedies. Defendant is granted summary judgment as to Plaintiff's Title VII claim.

Even if Plaintiff's Title VII claim was not barred by the exhaustion requirement, summary judgment must still be granted in favor of Defendant on the Title VII claim. To prevail on her hostile work environment claim based on sexual harassment, Plaintiff must demonstrate that: "(1) she was subjected to unwelcome sexual harassment; (2) the harassment was based on her sex;" (3) the harassment was "so severe or pervasive as to alter the conditions of employment and create an abusive working environment;" and (4) a basis for employer liability exists. *E.g.*, *McPherson v. City of Waukegan*, 379 F.3d 430, 437-38 (7th Cir.2004) (*McPherson*). Defendant contends that: (1) the sexual

encounter between Plaintiff and Nayman was not unwelcome, (2) events not involving the workplace cannot support Plaintiff's hostile work environment claim; and (3) any harassment Plaintiff suffered at work was not so severe or pervasive as to alter the conditions of her employment.

Plaintiff, citing *Mary M. v. N. Lawrence Cmty. Sch.*, 131 F.3d 1220, 1224 (7th Cir.1997) (*Mary M.*), argues that the sexual harassment occurring at Nayman's apartment was unwelcome because it constituted statutory rape under Illinois law. Plaintiff cites 720 ILCS 5/12, contending that Plaintiff had not reached the age of consent in a case of sexual assault.

However, *Mary M.* involved Title IX, the statutory provision prohibiting sexual harassment in education programs which receive federal funding. *Mary M.*, 131 F.3d at 1224. In *Mary M.*, the Seventh Circuit refused "to apply welcomeness as it has been interpreted in the Title VII context to Title IX cases." *Mary M.*, 131 F.3d at 1227. Thus, the *Mary M.* court affirmed the appropriateness of the welcomeness inquiry in Title VII; indeed, the Seventh Circuit opined that "welcomeness is properly a question of fact in the context of Title VII employment discrimination cases." *Mary M.*, 131 F.3d at 1226 (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)). Therefore, contrary to Plaintiff's contention, welcomeness in Plaintiff's sexual encounter with Nayman is a relevant inquiry in determining whether Plaintiff was sexually harassed under Title VII.

It is undisputed that Plaintiff voluntarily visited Nayman's apartment alone the day of the encounter. It is also

undisputed that Plaintiff asked Nayman to put a condom on before they had sex. It is further undisputed that after the sexual encounter, Plaintiff voluntarily interacted with Nayman in social situations outside of the workplace. As such, no genuine issue of material fact exists as to whether the sexual harassment was not unwelcome either in fact or law.

Furthermore, there is no genuine issue of material fact as to whether the sexual encounter involved Plaintiff's employment. It is undisputed that, on the day of the sexual encounter, Plaintiff did not work and voluntarily visited Nayman's apartment. While Plaintiff cites cases indicating that harassing conduct occurring outside the workplace can be actionable under Title VII, these cases involve harassing conduct that either occurred with a nexus to employment-related activities or that further explains the severity and pervasiveness of the sexual harassment which occurred in the workplace. *See, e.g., Burlington Indus. v. Ellerth*, 524 U.S. 742, 748, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1988) (harassing conduct occurred, in part, on a business trip); *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409-10 (1st Cir.2002) (stating that conduct occurring outside of the workplace explains why the plaintiff was so frightened of harasser in the workplace).

The conduct which occurred at the workplace was not severe or pervasive. To determine whether conduct is severe or pervasive, "a court must consider the totality of the circumstances, including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it

unreasonably interferes with an employee's work performance.'" *Cerros v. Steel Techs., Inc.*, 288 F.3d 1040, 1046 (7th Cir.2002) (*Cerros*) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)). Thus, the social context of the offending behavior must be carefully considered in determining whether conduct is severe or pervasive. *Cerros*, 288 F.3d at 1046.

Here, it is undisputed that through Plaintiff's approximately eight-month employment with Defendant, Nayman only touched Plaintiff on fifteen occasions. As detailed above, these touches included squeezing Plaintiff's arm above her elbow, whereby Nayman would ask Plaintiff how she was doing, or giving Plaintiff non-sexual "side hugs." Once, Nayman gave Plaintiff a hug and kiss in an effort to make Plaintiff happy; and another time, Nayman gave Plaintiff a "happy-to-see-you type of hug" when she came to work. Nayman also "playfully" hit Plaintiff on the behind with a rag on one occasion. On a few occasions, Nayman made allegedly harassing remarks towards Plaintiff, but it is undisputed that Plaintiff found these remarks "flattering." Despite these allegedly harassing workplace events, Plaintiff continued to visit with Nayman socially outside of work, even after Plaintiff's mother prohibited Plaintiff from visiting Nayman. Accordingly, no genuine issue of material fact exists as to whether the conduct which occurred at Plaintiff's workplace was not severe or pervasive.

None of the remaining claims have original federal jurisdiction. Under 28 U.S.C. § 1367(c)(3), "[t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the district court has

dismissed all claims over which it had original jurisdiction." "[T]he general rule is that when all federal claims are dismissed before trial, the district court should relinquish jurisdiction over pendent state-law claims rather than resolving them on the merits." *Kennedy v. Schoenberg, Fisher, & Newman, Ltd.*, 140 F.3d 716, 727 (7th Cir.1998) (citations omitted) (*Kennedy*). Therefore, jurisdiction is lacking to consider Plaintiff's state law claims.

CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is granted; and Plaintiff's Motion for Summary Judgment is denied. The parties' motions to strike are denied as moot.

Date: April 6, 2005

s/ John W. Darrah
JOHN W. DARRAH, Judge
United States District Court

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITIONS FOR REHEARING DATED AUGUST 31, 2006

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 31, 2006

Before

Hon. Richard A. Posner, *Circuit Judge*

Hon. Michael S. Kanne, *Circuit Judge*

Hon. Diane P. Wood, *Circuit Judge*

Nos. 04-3680, 05-1998 & 05-3770

JANE DOE,

Plaintiff-Appellant,

and

JANE ROE and JANE ROE 2,

Proposed-Intervenors-Appellants,

v.

OBERWEIS DAIRY,

Defendant-Appellee.

Appendix C

ORDER

On August 8, 2006, plaintiffs-appellants filed a petition for rehearing *en banc*, and on August 11, 2006, defendant-appellee filed a petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petitions, and none of the active judges has requested a vote on the petitions for rehearing *en banc*. The petitions are therefore DENIED.

APPENDIX D — RELEVANT STATUTE

42 U.S.C. § 2000e-5

* * *

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the

Appendix D

"respondent") within ten days, and shall make an investigation thereof. * * * If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. * * * If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. * * * The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

* * *

Appendix D

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. * * * If a charge filed with the Commission

pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge

(A) by the person claiming to be aggrieved or

(B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

* * * *